

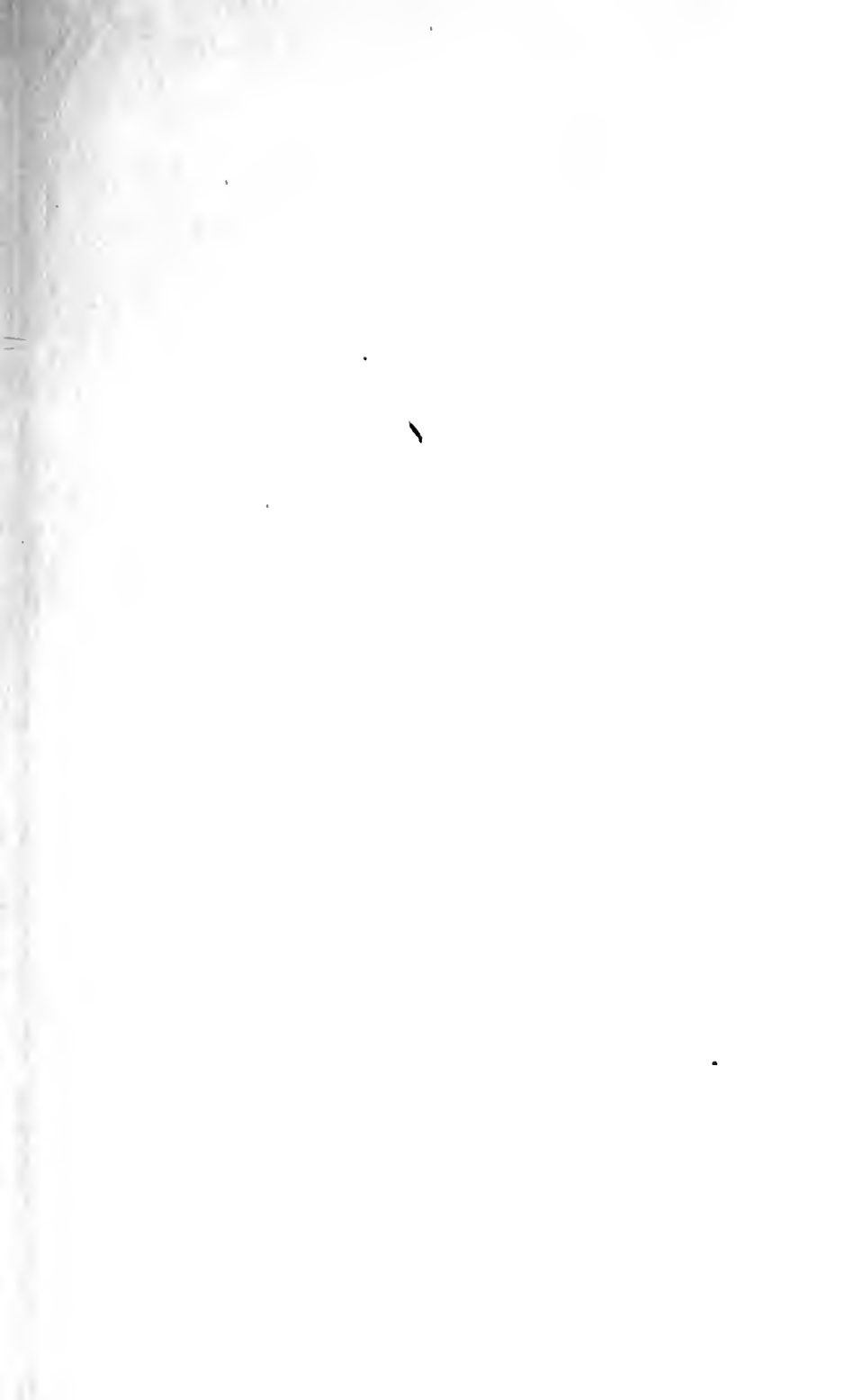
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No. 10131

United States
Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ROSE B. LARSON,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the
United States Board of Tax Appeals

FILED

JUL 10 1942

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Appearances:

For Taxpayer:

ISHAM N. SMITH

H. B. JONES

GEO. C. KINNEAR

For Commissioner:

B. H. NEBLETT

CLYDE R. MAXWELL

DOCKET ENTRIES

1937

Apr. 23—Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 23—Copy of petition served on General Counsel.

May 17—Answer filed by General Counsel.

May 20—Copy of answer served on taxpayer.

1938

Aug. 1—Hearing set Sept. 19, 1938, Seattle, Washington.

Sept. 2—Motion for a continuance filed by taxpayer. 9/6/38 granted.

1940

Aug. 29—Hearing set Nov. 11, 1940, in Seattle, Washington.

Nov. 12—Hearing had before Mr. Hill on merits. Submitted. Petitioner moves to amend petition—granted. Dockets 88813 and 14

consolidated for hearing. Appearance of H. B. Jones and George C. Kinnear filed. Amended petition and answer to amended petition filed. Reply filed and served. Stipulation of facts filed. Briefs due in 60 days. Replies in 30 days.

Dec. 11—Transcript of hearing 11/12/40 filed.

1941

Jan. 6—Motion for extension of 30 days to file brief filed by General Counsel. 1/7/41 granted.

Jan. 15—Stipulation as to deficiency notice in evidence—Exhibit No. 10—is No. 104214 filed.

Feb. 7—Brief filed by taxpayer.

Feb. 10—Brief filed by General Counsel.

Feb. 11—Copy of brief served on General Counsel.

Mar. 3—Reply brief filed by General Counsel.

March 10—Reply brief filed by taxpayer. 3/10/41 copy served on General Counsel.

July 24—Findings of fact and opinion rendered. Hill, #2. Decision will be entered under Rule 50. 7/29/41 copy served.

Nov. 7—Computation of deficiency filed by General Counsel.

Nov. 8—Hearing set Dec. 10, 1941, on settlement.

Nov. 10—Consent to settlement filed by taxpayer.

Nov. 13—Decision entered. Hill, Division 2.

1942

Feb. 2—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

Feb. 11—Proof of service filed by General Counsel.

Feb. 13—Proof of service filed by General Counsel.

Mar. 9—Certified copy of order from the 9th circuit extending the time to June 12, 1942, in which to complete and transmit the record filed.

Apr. 28—Statement of points filed by General Counsel, with proof of service thereon.

Apr. 28—Agreed statement of evidence filed.

Apr. 28—Agreed designation of contents of record filed, with proof of service thereon.

United States Board of Tax Appeals

Docket No. 88813

ROSE B. LARSON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency IT:E:2 JBS-90D dated January 27, 1937, and as a basis for her proceeding alleges as follows:

1. The petitioner is an individual whose place of residence is Yakima, Washington and she is the widow of A. E. Larson, deceased June 7, 1934.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on January 27, 1937.

3. The taxes in controversy are income taxes for the year 1933 and 1934. For 1933 the amount in controversy is \$1514.29 and for 1934 the amount in controversy is \$68,485.58.

4. For the year 1933 the income tax return of the petitioner reflected one-half of the net income of the community composed of A. E. Larson, husband, and Rose B. Larson, wife, and for the year 1934 the income tax return of the petitioner reflected one-half of the net income of the community of A. E. Larson, husband, and Rose B. Larson, wife, for the period January 1, 1934 to June 7, 1934.

5. For the year 1933 the determination of tax set forth in said notice of deficiency with respect to the amount of tax disputed is based upon errors of the Commissioner as follows:

(a) The holding by the Commissioner that notes held against the Daisy Mining And Milling Company represented investments in that company.

(b) Holding by the Commissioner that said notes had not been ascertained to be worthless.

(c) Holding by the Commissioner that said notes were not allowable deductions. [1*]

6. For the year 1934 and with respect to that portion of the tax which is in controversy, the determination thereof as set forth in said notice of deficiency is based upon the following errors of the Commissioner:

(d) The Commissioner errs in holding that the surviving spouse of a community estate is taxable upon one-half of the community income, whether or not withdrawn from the estate during the period of administration.

(e) The Commissioner errs with respect to a segregation of each item of income and expense reflected in the estate tax return as filed in holding that one-half of such income and expense should be reflected in an individual return for the surviving spouse.

On page 4 of the deficiency statement the Commissioner errs in holding that the following items are taxable to the petitioner as income:

Interest	\$ 2,374.68
Rentals (amount of \$9,782.29 included in \$11,557.11.....)	9,782.29
Profit on sale of assets.....	95,904.77
Dividends	33,453.64
Expense	322.56

[*Page numbering appearing at top of page of original Reporter's Transcript.]

The Commissioner further errs in reducing interest disallowed by \$425.64 which amount is one-half of interest expense of the estate.

The Commissioner further errs in allowing deduction of \$5.96 representing one-half of tax expense claimed in return for the estate.

The Commissioner further errs in allowing 1570.00 dividends erroneously accrued to June 7, 1934 to be taxable to the petitioner.

(f) The Commissioner errs in holding that no loss can be recognized where a portion of the partnership assets is distributed in kind in connection with its liquidation.

(g) The Commissioner errs in holding that the court considered the sale of 85,000 shares of Sunshine Mining Company stock as the sale of community property.

(h) The Commissioner errs in holding that the petitioner approved the sale of any of her community interest in the total of 210,974 shares of this stock owned by the community or that the petitioner's agent approved the [2] sale of any of the surviving widow's community interest in this stock.

7. With respect to the year 1933 the facts upon which the petitioner relies as the basis for this proceeding are as follows:

That between February 1, 1928 and December 31, 1930 A. E. Larson loaned to the Daisy Mining Company, an Idaho corporation, the sum of \$14,722.84

this total amount being loaned from the community funds of the community composed of A. E. Larson, husband, and Rose B. Larson, wife. That seven demand notes were issued to A. E. Larson by the Daisy Mining and Milling Company, the total amount of all the notes being in the sum of \$14,722.84.

That in the 1933 income tax return filed by the petitioner one-half of said loans of \$14,722.84 or the amount of \$7,361.42 was reflected as a deduction for bad debts.

That these notes were charged off as bad and uncollectible and that their worthlessness was determined at that time.

Uncollectible notes and accounts against an insolvent debtor are proper deductions for income tax purposes.

8. With respect to the year 1934 the facts upon which the petitioner relies as the basis for this proceeding are as follows:

Error 6-d

Under the laws of the State of Washington the entire community estate, during the process of administration is under probate and the only right the petitioner had to receive anything was pursuant to an order from the court.

Under the laws of the State of Washington the vested right of the surviving spouse to receive one-half of the income from the community properties terminates with the death of the deceased spouse

and such right does not accrue again until distribution of the corpus of the estate is made.

Error 6-e

The laws of the State of Washington eliminates the vested right of surviving spouse to receive one-half of the income from community properties, this right terminating with the death of the deceased spouse. [3]

Interest of \$2,374.68 added by the Commissioner to income represents one-half of the interest income reflected in estate tax return filed.

Rentals of \$9,782.29 added by the Commissioner to income represents that portion of the adjusted rental income applicable to the estate erroneously added to income of the petitioner.

Profit on sale of assets totalling \$95,904.77 includes the amount of \$95,543.75 erroneously computed on one-half of 85,000 shares of Sunshine Mining Company stock sold. This 85,000 shares represented an interest of the deceased spouse and did not include any interest of the surviving widow. As sale price was equivalent to appraised value no profit resulted.

Profit of \$250.00 on bank stock and profit of \$111.02 included in total profit of \$95,904.77 are taxable to the estate and not to the surviving spouse.

Dividends totalling \$33,453.64 represent one-half of the adjusted dividend income to the estate and are taxable to the estate and not to the surviving widow.

Interest paid which was disallowed amounted to \$1,901.96 and this amount should be returned to income instead of \$1,476.32. The amount of \$1,901.96 was reduced by \$425.64 which latter amount represented one-half of estate's interest expense.

Taxes of \$5.96 allowed as deduction by Commissioner represents one-half of tax expense claimed by the estate and this item of \$5.96 is erroneously allowed by the Commissioner.

Item of expense for \$322.56 returned erroneously to income by the Commissioner represents one-half of legal expense claimed by the petitioner to June 7, 1934.

Item of \$1,570.00 was erroneously accrued and reflected in net income reported of \$32,132.38. The Commissioner errs in not reducing dividend income by this item of \$1,570.00.

Error 6-f

A. E. Larson was a partner in the partnership of Burrows Motor Company of Yakima, Washington. The partners were A. E. Larson and Grover Burrows. The interest of A. E. Larson was the interest of the community composed of A. E. Larson, husband, and Rose B. Larson, wife. [4]

After the death of Mr. Larson June 7, 1934 neither the estate nor Rose B. Larson, the widow, desired to continue interest in the partnership. The community interest was equal to 87.79% of the partnership net worth.

A court order was signed giving the surviving partner the preferential right to purchase the estate's interest in the partnership, this court order being No. 8561 and dated July 31, 1934.

In the sale to Grover Burrows the book values of assets and liabilities were considered to be as follows:

Assets	\$320,998.02
Liabilities	90,667.52
	<hr/>
	\$230,330.50

The above amount of \$320,998.02 represents the book values of assets and not the values at which the various items were appraised in the estate's inventory.

The value of the community estate's interest in the partnership was 87.79% of \$230,330.50 or \$202,207.15.

Included in the total partnership assets amounting to \$320,998.02 were the following:

Garage building with book value	
of	\$68,593.27
Sundry stock with book values of	4,728.88
	<hr/>
	\$73,322.15

In the sale to Grover Burrows these assets were retained by the estate. In deducting this amount of \$73,322.15 from the equity in partnership of \$202,207.15 there remained a balance of \$128,885.00 rep-

resenting the remaining portion of estate's equity in the partnership on the basis of book values and not the appraised values used in the estate's inventory.

For the remaining balance of \$128,885.00 in the partnership equity the estate received \$16,041.46 in cash and other items and notes totalling \$75,000.00 making a total amount of \$91,041.46, the difference between the remaining balance of equity and the amount received being \$37,843.54.

In the sale to Grover Burrows of the various assets purchased by him, the assets were priced on basis of appraised values. Included in said assets were certain items of real estate, the book values of which were \$11,625.87 and the appraised values of which were \$8,210.00. As the estate had retained the garage building, the petitioner considers the real estate items taken over by Grover Burrows as a distribution in kind and the loss of \$3,415.87, [5] being difference between \$11,625.87 and \$8,210.00, was deducted from loss of \$37,843.54 reflected in the transaction. This resulted in loss of \$34,427.67, apportioned as follows:

Loss reflected in notes, contracts and accounts receivable, mer- chandise inventories, etc.....	\$33,502.87
Loss reflected in sale of capital assets	924.80
	<hr/>
	\$34,427.67

In the sale to Mr. Burrows values placed upon the assets were the values at which said assets were priced in the estate's inventory so that no loss resulted as applicable to the one-half community interest of the deceased spouse.

As book values represent the cost of the surviving spouse's interest the loss claimed would amount to one-half of total loss in the transaction.

Error 6-g

The court did not consider that the sale of 85,000 shares of Sunshine Mining Company stock included any of the one-half community interest of the surviving spouse.

The court would not approve a sale encroaching upon the vested interest of the surviving spouse in one-half of the community property for the purpose of paying bequests named in the will of the deceased as the laws of the State of Washington provide against such a procedure.

Error 6-h

The petitioner did not approve the sale of any of her community interest in the total stock held by the community.

Shirley D. Parker, business agent for the petitioner, did not approve of the sale of any of the community interest of the petitioner in total stock held by the community. [6]

Wherefore, the petitioner prays that this Board may hear the proceedings and grant relief to the

extent of reduction of \$1514.29 in deficiency for the year 1933 and to the extent of a reduction of \$68,485.58 in deficiency for the year 1934.

ROSE B. LARSON,

Petitioner.

Yakima, Washington.

ISHAM N. SMITH,

Counsel for petitioner.

Yakima, Washington.

State of Washington,
County of Yakima—ss.

Rose B. Larson, being duly sworn, states that she is the widow of A. B. Larson, deceased, that she is competent to verify the foregoing petition, that she has had the same read to her and is familiar with the statements contained therein, and that the facts stated are true except as to those facts stated to be upon information and belief, and those facts she believes to be true.

ROSE B. LARSON

Subscribed and sworn to before me this 21st day of April, 1937.

I. J. BOUNDS,

Notary Public in and for Yakima County, State of
Washington, residing at Yakima, Washington.
(Seal) [7]

Treasury Department
Washington

Office of
Commissioner of
Internal Revenue

Address Reply to
Commissioner of
Internal Revenue
and Refer to

January 27, 1937

Mrs. Rose B. Larson,
c/o Shirley Parker,
Larson Building,
Yakima, Washington

Madam:

You are advised that the determination of your income tax liability for the taxable years 1933 and 1934 discloses a deficiency of \$71,287.47 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, and section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By W. T. SHERWOOD,

(Signed)

Acting Deputy Commissioner.

Enclosures:

Statement

Form 870

1093M [8]

STATEMENT

IT:E:2

JBS-90D

In re: Mrs. Rose B. Larson,
c/o Shirley Parker,
Larson Building,
Yakima, Washington.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1933	\$ 3,353.23	\$1,309.25	\$ 2,043.98
1934	72,438.85	3,195.36	69,243.49
Totals	\$75,792.08	\$4,504.61	\$71,287.47

The deficiency shown herein is based upon the report dated September 26, 1935, prepared by Revenue Agent W. G. Boyd, a copy of which was transmitted to you.

Careful consideration has been accorded your protest dated December 2, 1935, in connection with the findings of the examining officer and the information submitted at a conference held in the office of the internal revenue agent in charge. Also the information contained in the letter dated November 10, 1936, of your agent Mr. I. H. Church, submitted to the revenue agent.

Inasmuch as no further evidence was submitted that may be regarded as a basis for changing the original findings of the revenue agent and since it is indicated in Mr. Church's letter of November

13, 1936, you desire to stand on the facts previously presented to the agent, it is necessary for this office to issue the final notice of deficiency.

A synopsis of your return as adjusted follows:

1933

Net income reported on return.....		\$57,820.77
Joint net income reported.....		\$57,820.77
Plus:		
(a) Increase in partnership income.....\$	561.66	
(b) Increase in rentals.....	5,158.14	
(c) Disallowance of bad debts.....	15,272.84	
(d) Dividends	1,973.58	
		<hr/>
		\$22,966.22
Less:		
(e) Excise tax on dividends.....	1,973.58	20,992.64
		<hr/>
Adjusted joint income.....		\$78,813.41
		[9]
Husband's community income.....		\$39,406.70
Wife's community income.....		\$39,406.71
Less:		
Dividends as adjusted.....	\$29,980.60	
Personal exemption and credit		
for dependents	1,250.00	31,230.60
		<hr/>
Balance subject to normal tax.....		\$ 8,176.11
Normal tax at 4% on \$4,000.00.....		\$ 160.00
Normal tax at 8% on \$4,176.11.....		334.09
Surtax on \$39,406.71.....		2,859.14
		<hr/>
Total tax assessable.....		\$ 3,353.23
Tax previously assessed, account #212368.....		1,309.25
		<hr/>
Deficiency		\$ 2,043.98

Explanation of Changes

(a) Due to an adjustment in depreciation of the partnership of Burrows Motor Company, on depreciable assets, the income of the partnership was increased by \$842.50. The amount applicable to your joint income is, therefore, $\frac{2}{3}$ of \$842.50, or \$561.66.

(b) The increase in rental property is due to adjustments in depreciation as shown below:

Kind of Asset	Date of Acquisition	Cost	Depreciation Reserve Dec. 31, 1932	Residual Value Dec. 31, 1932	Life Remaining	Depreciation 1933
Garage building (brick).....	1921	\$ 6,000.00	\$ 2,880.00	\$ 3,120.00	25 yrs.	\$ 124.80
Donnelly Hotel building (brick).....	1928	125,000.00	17,187.50	107,812.50	28¾ yrs.	3,750.00
Grandview building (brick).....	1928	8,741.40	1,476.27	7,265.13	25 yrs.	290.60
Wapato House (frame).....	1931					
	1933	1,800.00	—	1,800.00	33½ yrs.	40.50
Larson building furniture.....	1930	6,575.33	900.93	5,674.40	13 yrs.	436.49
						[10]
Larson building temporary layout.....	1930	31,145.84	2,800.84	28,345.00	23 years	1,232.39
Larson building elevators.....	1930	58,677.00	4,156.25	54,520.75	23 years	2,370.47
Larson building plumbing & heating.....	1930	85,765.91	6,075.04	79,690.87	23 years	3,464.82
Larson building proper.....	1930	413,391.18	12,573.97	400,817.21	58 years	6,910.64
Temporary layouts.....	1933	144.00	—	144.00	25 years	2.88
Furniture and fixtures.....	1933	1,471.61	—	1,471.61	15 years	49.05
Dorothy Henry.....	1933	581.68	—	581.68	15 years	38.77
Totals.....		\$739,293.95	\$48,050.80	\$691,243.15		\$18,711.41
Amount claimed						23,869.55
Disallowance						\$ 5,158.14

(c) Bad debts amounting to \$15,272.84, representing loss on the following notes, have been disallowed:

Kappleman Brothers.....		\$ 50.00
E. G. Morgan.....		500.00
Daisy Mining and Milling Company	February 1, 1928.....	1,600.00
Daisy Mining and Milling Company	March 1, 1928.....	1,000.00
Daisy Mining and Milling Company	April 1, 1928.....	800.00
Daisy Mining and Milling Company	May 1, 1928.....	1,600.00
Daisy Mining and Milling Company	July 23, 1929.....	1,522.84
Daisy Mining and Milling Company	December 31, 1929.....	3,600.00
Daisy Mining and Milling Company	December 31, 1930.....	4,600.00
Total.....		<u>\$15,272.84</u>

It is noted that the notes of Kappleman Brothers and E. G. Morgan cannot be located. In both cases it is known that both of these companies failed several years prior to 1933. [11]

It is held by this office that the investments in the Daisy Mining and Milling Company have not been ascertained to be worthless and are, therefore, not allowable deductions, whether claimed as notes, loan certificates or corporate stock.

(d) and (e). You failed to report the full amount of dividends received. You are advised \$1,973.58 paid for excise taxes has been included in dividends and a like amount has been allowed as a deduction in taxes paid.

1934

Net income reported.....			\$32,132.38
Plus:			
(a) Interest	\$ 2,374.68		
(b) Partnership profit	928.37		
(c) Rentals	11,557.11		
(d) Profit on sale of assets.....	95,904.77		
(e) Dividends	33,453.64		
(f) Interest paid	1,476.32		
(g) Expense	322.56		
		\$146,017.45	
Less:			
(h) Salary	\$224.19		
(i) Taxes	5.96		
(j) Bad Debts	390.31	620.46	145,396.99
Net income			\$177,529.37
Less:			
Personal exemption			1,104.16
Income subject to surtax.....			\$176,425.21
Less:			
Dividends	\$65,288.07		
Earned income credit.....	300.00		65,588.07
Balance subject to normal tax.....			\$110,837.14
			[12]
Normal tax at 4% on \$110,837.14.....		\$ 4,433.49	
Surtax on \$176,425.21.....		68,005.36	
Total tax assessable.....			\$72,438.85
Tax previously assessed, #June 200037.....			3,195.36
Deficiency			\$69,243.49

Explanation of Changes

It is held by this office that the surviving spouse of a community estate is taxable upon her one-half

of the community income, whether or not withdrawn from the estate during the period of administration.

(a) The amount of \$2,374.68 represents your one-half interest received through the community property Estate of Albert E. Larson from June 7, to December 31, 1934, which was reported on the return filed for the estate.

(b) The corrected partnership profit of \$3,332.36 is your community one-half of the adjusted partnership income to June 7, 1934. The partnership was not continued after June 7, 1934. No loss can be recognized where a portion of the partnership assets is distributed in kind in connection with its liquidation.

(c) Increase on rentals are due to the following adjustment:

Joint income from January 1 to June 7, 1934 reported.....	Loss	\$2,757.29
Plus:		
Insurance paid as verified by records.....	\$1,404.32	
Excessive depreciation as shown in (c)	2,145.30	3,549.62
Profit		\$ 792.33
Profit your community one-half.....		\$ 396.17
Loss reported		1,378.65
Increase		\$ 1,774.82
Income from rented properties from June 7, 1934 to December 31, 1934 (not reported) as shown in attached schedule A.....		9,782.29
Total adjustment		\$11,557.11

(d) The amount of \$95,904.77 as shown in schedule B attached, represents profit on sale of interest in community property during course of Probate of Estate of A. E. Larson. It is noted that you contend that the stock sold was from the one-half community interest belonging to Mr. Larson and that none of the stock pertaining to Mrs. Larson's one-half interest was sold.

An examination of the court files in connection with the administration of this estate does not indicate any attempt to distinguish the stock sold. Likewise upon sale or other disposition of any other property involved in the estate, no attempt is made to segregate your community interest from that of the estate.

Under the terms of the will you are the residuary legatee. The estate was solvent, and the indications were that the payment of bequest would not consume in excess of 50 percent of Mr. Larson's one-half of the community. You had an undivided one-half interest in all property included in the estate and as residuary legatee, a 100 percent interest in the estate after payment of specific bequests.

It is further noted that you contend that the stock sold was singled out and sold from the estate's one-half especially for the payment of bequests.

You are advised the records do not indicate this to be the case. In fact, the records indicate that the court considered this to be a sale of community property, and your approval through your agent was obtained before the sale was authorized.

(e) It is held that the dividends received on your one-half of corporate stock during process of probate should be reported on your return as shown below.

One-half dividends as shown on return of	
A. E. Larson, deceased.....	\$31,834.43
One-half dividends reported on return of	
Estate of A. E. Larson.....	31,653.64
One-half of \$3,600.00 dividends omitted	
from estate return.....	1,800.00
<hr/>	
Total	\$65,288.07
Amount reported	31,834.43
<hr/>	
Increase	\$33,453.64
<hr/>	
[14]	

(f) Interest of \$1,901.96 paid after June 7, 1934, was paid on loan made by Shirley Parker for purpose of investment in a syndicate known as Sunshine Consolidated. Since this loan appears to be his loan, the deduction for interest cannot be allowed on your return.

You are entitled, however, to one-half of the community interest expense shown on the Estate of A. E. Larson, or \$425.64. The adjustment of these items makes a net disallowance of \$1,476.32.

(g) Community half of \$322.56 representing fee paid to Mr. Parker for perfecting title to property appears to be a capital item.

(h) The corrected salaries as shown are the community one-half salaries received up to the death of Mr. Larson as shown below:

Fees received from Surety Finance Company.....	\$ 25.00
Salaries received from Sunshine Mining Co.....	1,046.67
Guaranty Trust Co. fees.....	20.00
<hr/>	
Total	\$1,091.67
Your community share.....	\$ 545.83
Amount reported on return.....	770.02
<hr/>	
Overstatement	\$ 224.19

(i) You are entitled to a deduction to one-half of miscellaneous taxes paid by community property Estate of A. E. Larson.

(j) You have been allowed your community one-half of \$780.63 representing the Boland, Bond and unpaid balance of Bittner (Sr.) accounts which were actually written off the books in the year 1934.

A copy of this letter, together with a copy of the statement and schedules has been mailed to your representative, Isham N. Smith, 1014, Larson Building, Yakima, Washington, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [15]

EXHIBIT A

INCOME FROM RENTED PROPERTY FROM JUNE 7, 1934
TO DECEMBER 31, 1934 AS ADJUSTED

	Reported	Receipts Issued
Donnelly Hotel	\$10,826.66	\$10,826.66
Grandneir Motor Building.....	270.66	270.66
Wapato Building	53.58	53.58
Burrows Motor Building.....	2,450.00	2,450.00
Larson Building	29,617.80	29,617.80
Total	<u>\$43,218.70</u>	<u>\$43,218.70</u>
Less expenses:		
Repairs	\$ 45.16	\$ 45.16
Insurance	1,611.88	646.67
Taxes	5.20	5.20
Labor	4,876.82	4,876.82
Light, heat, etc.....	5,561.26	5,561.26
Interest	389.71	389.71
Total expenses	<u>\$12,490.03</u>	<u>\$11,524.82</u>
Depreciation on your half.....	7,664.98	6,064.65
Depreciation on estate's half.....	3,515.02	3,656.83
Total deductions	<u>\$23,670.03</u>	<u>\$21,246.30</u>
Total receipts	<u>\$43,218.70</u>	<u>\$43,218.70</u>
Total deductions	<u>23,670.03</u>	<u>21,246.30</u>
Net income	<u>\$19,548.67</u>	<u>\$21,972.40</u>
One-half receipts	\$21,609.35	\$21,609.35
One-half expenses	6,245.02	5,762.41
Sub-total	<u>\$15,364.33</u>	<u>\$15,846.94</u>
Depreciation of Mrs. Larson.....	7,664.98	6,064.65
Income, Mrs. Larson.....	<u>\$ 7,699.35</u>	<u>\$ 9,782.29</u>

	Profit	Percent Taxable	Amounts
0	\$ 13,750.00	40 percent	\$ 5,500.00
0	27,625.00	40 percent	11,050.00
0	14,312.50	30 percent	4,293.75
0	97,500.00	40 percent	39,000.00
0	17,000.00	30 percent	5,100.00
0	34,000.00	30 percent	10,200.00
0	34,000.00	30 percent	10,200.00
0	17,000.00	30 percent	5,100.00
0	17,000.00	30 percent	5,100.00
0	<hr/>		<hr/>
0	\$272,187.50		\$95,543.75
0	\$ 625.00	40 percent	\$ 250.00
0	—	—	—
0	—	—	—
0	—	—	—
0	—	—	—
0	—	—	—
8	—	—	—
0	138.77	80 percent	111.02
8	<hr/>		<hr/>
8	\$272,951.27		\$95,904.77

EXHIBIT A

INCOME FROM RENTED PROPERTY FROM JUNE 7, 1934
TO DECEMBER 31, 1934 AS ADJUSTED

	Reported	Receipts Issued
Donnelly Hotel	\$10,826.66	\$10,826.66
Grandneir Motor Building.....	270.66	270.66
Wapato Building	53.58	53.58
Burrows Motor Building.....	2,450.00	2,450.00
Larson Building	29,617.80	29,617.80
Total	\$43,218.70	\$43,218.70
Less expenses:		
Repairs	\$ 45.16	\$ 45.16
Insurance	1,611.88	646.67
Taxes	5.20	5.20
Labor	4,876.82	4,876.82
Light, heat, etc.....	5,561.26	5,561.26
Interest	389.71	389.71
Total expenses	\$12,490.03	\$11,524.82
Depreciation on your half.....	7,664.98	6,064.65
Depreciation on estate's half.....	3,515.02	3,656.83
Total deductions	\$23,670.03	\$21,246.30
Total receipts	\$43,218.70	\$43,218.70
Total deductions	23,670.03	21,246.30
Net income	\$19,548.67	\$21,972.40
One-half receipts	\$21,609.35	\$21,609.35
One-half expenses	6,245.02	5,762.41
Sub-total	\$15,364.33	\$15,846.94
Depreciation of Mrs. Larson.....	7,664.98	6,064.65
Income, Mrs. Larson.....	\$ 7,699.35	\$ 9,782.29

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Mrs. Rose B. Larson.

SCHEDULE B

Kind of Stock	Number Shares	Certificate Number	Date Acquired	Time held	Cost of Undivided Half	Selling Price Undivided Half	Profit	Percent Taxable	Amount
Sunshine Mining Co.	5,000	2822	Feb. 9, 1929	5 - 10 years	(1) \$ 3,500.00	\$ 17,250.00	\$ 13,750.00	40 percent	\$ 5,500.00
Sunshine Mining Co.	10,000	1147	Nov. 30, 1925	5 - 10 years	(2) 1,500.00	29,125.00	27,625.00	40 percent	11,050.00
Sunshine Mining Co.	5,000	738	Prior 1924	Over 10 years	250.00	14,562.50	14,312.50	30 percent	4,293.75
Sunshine Mining Co.	30,000	1346	Nov. 1, 1926	5 - 10 years	(2) 6,000.00	103,500.00	97,500.00	40 percent	39,000.00
Sunshine Mining Co.	5,000	739	Prior 1924	Over 10 years	250.00	17,250.00	17,000.00	30 percent	5,100.00
Sunshine Mining Co.	10,000	601	Prior 1924	Over 10 years	500.00	34,500.00	34,000.00	30 percent	10,200.00
Sunshine Mining Co.	10,000	633	Prior 1924	Over 10 years	500.00	34,500.00	34,000.00	30 percent	10,200.00
Sunshine Mining Co.	5,000	654	Prior 1924	Over 10 years	250.00	17,250.00	17,000.00	30 percent	5,100.00
Sunshine Mining Co.	5,000	736	Prior 1924	Over 10 years	250.00	17,250.00	17,000.00	30 percent	5,100.00
	85,000				\$13,000.00	\$285,187.50	\$272,187.50		\$95,543.75
West Side National Bank			Dec. 26, 1926	5 - 10 years	\$ 3,000.00	\$ 3,625.00	\$ 625.00	40 percent	\$ 250.00
L. I. D. #422					2,250.00	2,250.00	—	—	—
District 18					500.00	500.00	—	—	—
L. I. D. #374					250.00	250.00	—	—	—
L. I. D. #386					50.00	50.00	—	—	—
L. I. D. #395					2,500.00	2,500.00	—	—	—
Lovell Mortgage					1,868.78	1,868.78	—	—	—
Wapato House and Lot			1933	1 - 2 years	961.23	1,100.00	138.77	80 percent	111.02
Gain					\$24,380.01	\$297,331.28	\$272,951.27		\$95,904.77

(1) This value based on notation certificate #2996 which was acquired May 9, 1929 at cost of \$1,472.00 a share.

(2) Cost not over amount shown.

Depreciation		One-half Depreciation		Community One-half Depr'n Reserve	
To June 7, 1934 43.61%	June 7, 1934 to Dec. 31, 1934	June 7, 1934 to Dec. 31, 1934	Cost	Dec. 31, 1934	
.80	\$ 54.44	\$ 70.36	\$ 35.18	\$ 3,000.00	\$ 1,564.80
.00	1,635.38	2,114.62	1,057.31	62,500.00	12,343.75
.60	126.74	163.86	81.93	4,370.70	1,028.73
.05	23.55	13.50*	6.75	900.00	38.77
.49	190.35	246.14	123.07	3,287.66	886.96
.39	537.46	694.93	347.47	15,572.92	2,632.81
.47	1,033.76	1,336.71	668.35	29,338.50	4,448.59
.80	1,511.01	1,953.81	976.90	42,882.96	6,502.34
.64	3,013.73	3,896.91	1,948.46	206,695.59	13,197.62
.76	2.52	3.24	1.62	72.00	4.32
.49	.19	Approx. 4.30	2.15	95.51	2.25
.17	40.64	53.53	26.76	735.80	71.61
.17	.67	1.50	.75	20.05	1.09
.16	25.35	32.81	16.41	290.84	48.47
.01	*\$8,195.79	\$10,586.22	\$5,293.11	\$369,762.53	\$42,772.11
.86			771.34	37,616.27	771.34
.87			*\$6,064.45	\$407,378.80	\$43,543.45

[Endorsed]: Filed April 23, 1937. [18]

IT:E:2

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Mrs. Rose B. Larson.

SCHEDULE C
Depreciation and Depreciable Assets

Kind of Assets	Date Acquired	Cost	Depreciation Reserve Dec. 31, 1933	Residual Value Dec. 31, 1933	Life Original Remaining	Depreciation			One-half Depreciation June 7, 1934 to Dec. 31, 1934	Cost	Community One-half Depreciation Reserve Dec. 31, 1934
						Entire Year	To June 7, 1934 43.61%	June 7, 1934 to Dec. 31, 1934			
Grandview Garage (Brick)	1921	6,000.00	\$ 3,004.80	\$ 2,995.20	24 years	\$ 124.80	\$ 54.44	\$ 70.36	\$ 35.18	\$ 3,000.00	\$ 1,564.80
Donnelly Hotel Building (Brick)	1928	125,000.00	20,937.50	104,062.50	27½ years	3,750.00	1,635.38	2,114.62	1,057.31	62,500.00	12,343.75
Grandview Building (Brick)	1928	8,741.40	1,766.87	6,974.53	24 years	290.60	126.74	163.86	81.93	4,370.70	1,028.73
Wapato Dwelling	Mar. 1, 1933	1,800.00	40.50	1,759.50	Approx. 32½ years	37.05	23.55	13.50*	6.75	900.00	38.77
Larson Building Furniture	1930	6,575.33	1,337.42	5,237.91	12 years	436.49	190.35	246.14	123.07	3,237.66	886.96
Larson Building Temporary Layout	1930	31,145.84	4,033.23	27,112.61	22 years	1,332.39	537.46	694.93	347.47	15,572.92	2,632.81
Larson Building Elevator	1930	58,677.00	6,526.72	52,150.28	22 years	2,370.47	1,033.76	1,336.71	668.35	29,338.50	4,448.59
Larson Building Plumbing and Heating	1930	85,765.91	9,539.86	76,226.05	22 years	3,464.80	1,511.01	1,953.81	976.90	42,882.96	6,502.34
Larson Building Proper	1930	413,391.18	19,484.61	393,906.57	57 years	6,910.64	3,013.73	3,896.91	1,948.46	206,695.59	13,197.62
Larson Building Temporary Layouts	June 30, 1933	144.00	2.88	141.12	25 years	5.76	2.52	3.24	1.62	72.00	4.32
Larson Building Temporary Layouts	Mar. 7, 1934	191.02		191.02	25 years	Approx. 4.49	.19	Approx. 4.30	2.15	95.51	2.25
Larson Building Furniture and Fixtures	June 30, 1933	1,471.61	49.05	1,422.56	15 years	Approx. 94.17	40.64	53.53	26.76	735.80	71.61
Larson Building Furniture and Fixtures	Mar. 7, 1934	40.10		40.10	15 years	Approx. 2.17	.67	1.50	.75	20.05	1.09
Larson Building Dorothy Henry Fixtures	June 30, 1933	581.68	38.77	542.91	10 years	58.16	25.35	32.81	16.41	290.84	48.47
		\$739,525.07	\$66,762.21	\$672,762.86		\$18,782.01	*\$8,195.79	\$10,586.22	\$5,293.11	\$369,762.53	\$42,772.21
Burrows Motor Building One-half interest	June 7, 1934	37,616.27			27½ years	1,367.86			771.34	37,616.27	771.34
		\$777,141.34				\$20,149.87			*\$6,064.45	\$407,378.80	\$43,543.45

Mrs. Larson is allowed one-half depreciation to date of Mr. Larson's death. She is allowed depreciation on one-half the assets from that date to December 31, 1934

Depreciation claimed January 1, 1934 to June 7, 1934	\$10,341.09
Depreciation allowed	* 8,195.79
Difference as shown under (e)	\$ 2,145.30
Depreciation allowed June 7, 1934 to December 31, 1934 as shown in Schedule A	\$ 6,064.45

[Endorsed]; Filed April 23, 1937. [18]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1933 and 1934 and amount to \$2,043.98 and \$69,243.49, respectively. Denies that the amounts in controversy are \$1,514.29 for 1933 and \$69,485.58 for 1934, as alleged in paragraph 3 of the petition.

4. Denies the allegations contained in paragraph 4 of the petition.

5. Denies the assignments of error contained in subparagraphs (a), (b) and (c) of paragraph 5 of the petition.

6. Denies the assignments of error contained in subparagraphs (d) to (h), incl., of paragraph 6 of the petition. [19]

7. Denies the allegations of fact set forth in paragraph 7 of the petition.

8. For lack of information as to the actual facts, respondent denies the allegations contained in sub-

paragraphs headed "Error 6-d; 6-e; 6-f; 6-g and 6-h" of paragraph 8 of the petition.

9. Denies that petitioner is entitled to any of the relief prayed for in the petition.

10. Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted, qualified or denied.

Wherefore, it is prayed that the appeal of the petitioner be denied.

MORRISON SHAFROTH,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

JOHN F. GREANEY,

JOHN D. KILEY,

Special Attorneys,

Bureau of Internal Revenue.

JWS/hec 5/15/37 [20]

[Endorsed]: Filed May 17, 1937.

[Title of Board and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of a deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated January 27, 1937, bearing symbols IT:E:2—JES—90D, and as a basis for this proceeding alleges as follows:

1. Petitioner is an individual residing in the City of Yakima, Yakima County, Washington, and is the widow of A. E. Larson, deceased, June 7, 1934. The notice of deficiency from which this appeal is taken (copy of which is attached to the original petition herein and marked Exhibit "A") was mailed to the petitioner on or subsequent to January 27, 1937.

2. The taxes in controversy are income taxes for the calendar years 1933 and 1934. The amount of the deficiency determined by the respondent for the year 1933 is \$2,043.98, [21] substantially all of which is in dispute, and for the year 1934 is \$69,-243.49, all of which is in dispute herein.

3. In the determination of the proposed deficiency for 1933 respondent has erred in the following respects:

A. Disallowance of community one-half of indebtedness due to the taxpayer from Daisy Mining & Milling Company, amounting to the sum of \$14,722.84, E. G. Morgan \$500.00, and Kappleman Brothers \$50.00.

B. Increase in rentals of \$5,158.14.

4. In support of the assignments of error stated in the preceding paragraph, petitioner alleges:

A. That the community composed of the taxpayer and her husband had, over a period of years prior to the taxable year, made loans to Daisy Mining & Milling Company, a corporation, amounting to and represented by promis-

sory notes of said debtor aggregating the sum of \$14,722.84, to E. G. Morgan amounting to \$500.00 and to Kappleman Brothers amounting to \$50.00, all of which amounts were due and owing to the taxpayer in the taxable year 1933 and which amounts were and during such taxable year were determined by the taxpayer to be uncollectible and worthless and were charged off by the taxpayer as shown upon her books of account for said year.

B. The increase in rentals made by respondent is due almost entirely to disallowance of depreciation [22] claimed in connection with the Larson Building, its equipment, furnishings and fixtures. This is a modern business and office building erected in 1930 in the City of Yakima, Washington. The taxpayer claimed depreciation on the building itself based upon a fifty-year life, upon elevators, plumbing and heating equipment based upon a twenty-year life, and upon furniture, fixtures and temporary layouts installed in 1933 based upon a ten-year life. Adjustments made by respondent are based upon a life for the building of sixty years, for elevators, plumbing and heating, temporary layouts of twenty-five years, and furniture and fixtures of fifteen years. Petitioner asserts that the practical useful economic life of each of the several classes of property does not and will not exceed the life claimed by

the taxpayer and used as a basis for depreciation deduction in taxpayer's return, and that the amounts so claimed were and are fair, reasonable, proper and allowable under the applicable law and regulations and should not be changed.

5. For the year 1934 petitioner alleges that respondent erred in the following respects:

A. In holding generally that the petitioner, as the surviving spouse of a marital community having community property income under the laws of the State of Washington, is taxable upon her one-half of such community income during the period of administration [23] whether or not withdrawn from the estate.

B. In adding to petitioner's income interest in the sum of \$2,374.68.

C. In adding to petitioner's income rental of \$11,557.11.

D. In adding to petitioner's income profit on sale of assets of \$95,904.77.

E. In adding to petitioner's income dividends in the sum of \$33,453.64.

F. In disallowing as a deduction and in adding to petitioner's income interest paid in the sum of \$1,901.96.

G. In not allowing to petitioner, in the event her community one-half of income received by the estate of A. E. Larson from com-

munity property during course of administration is includable in her income and taxable to her, an allowance of \$17,213.83 representing loss sustained by petitioner upon her community one-half interest in property sold by the estate to Grover Burrows of Yakima, Washington, in the taxable year.

H. In including in petitioner's taxable income dividends of \$1,570.00 from Surety Finance Company of Yakima on the basis that the same accrued prior to June 7, 1934. [24]

6. In support of the assignments of error set forth in the preceding paragraph, petitioner relies upon the following facts:

A. Upon the death of her husband, A. E. Larson, on June 7, 1934, his will was submitted to probate in the Superior Court of the State of Washington for Yakima County on June 13, 1934, and an executor appointed. All of the property owned by decedent or petitioner was community property and under the law of the State of Washington petitioner's one-half community interest was subject to control and administration by the executor and the probate court during all of the taxable year, and the said estate constituted a trust which was entitled to and did receive all of the community income and has reported the same as a separate legal and taxable entity. The respondent has accepted the return of the estate upon such basis

and the payment of tax thereon, and has proposed a deficiency against such estate as a separate taxpayer based upon the inclusion in the return of said estate of all of the income from community property and without credit for any amount paid or distributable to the petitioner. To now tax the petitioner upon the same income, which has already been taxed to the said estate, constitutes double taxation contrary to law and in violation of the Constitution of the United States and particularly Section 8 of Article I thereof and Amendment Fifth thereto. [25]

B. The item of interest of \$2,374.68 is income upon the entire community property being administered, and which was returned and taxed as set forth in Paragraph A above, and is, therefore, not properly includable in the income of this taxpayer for the taxable year.

C. The item of rental of \$11,557.11 represents income upon the entire community property being administered, and which was returned and taxed as set forth in Paragraph A above, and is, therefore, not properly includable in the income of this taxpayer for the taxable year. In addition, this item is subject to adjustment for depreciation with respect to the Larson Building for the reasons and upon the basis set forth in Paragraph 4 B above.

D. The item of profit on sale of assets relates, to the extent of \$95,543.75, to the sale of

85,000 shares of Sunshine Mining Company stock made by the executor of the estate of A. E. Larson during the taxable year for the purpose of paying legacies provided in decedent's will. The property sold was stock belonging to the decedent's community one-half interest and not to the petitioner, and the entire profit, if any, was the profit of the estate of A. E. Larson and not of petitioner. The respondent has, by deficiency letter directed [26] to the estate of said decedent, so treated said sale and the alleged profits thereof and has determined a deficiency against said estate upon such basis.

In addition and even if any part of such profit is taxable to petitioner, the basis of such stock to petitioner adopted by respondent is incorrect and the true basis of such stock was \$.536 per share.

E. The item of dividends amounting to \$33,453.64 represents dividends upon the entire community property of the decedent and the petitioner and, therefore, none of such item is properly includable in the income of this taxpayer for the taxable year.

In addition thereto it includes one-half of an item of \$3,600.00 dividends paid upon the capital stock of Surety Finance Company of Yakima, which was not received and did not constitute income for or during the period involved herein. Such amount was a dividend

paid pursuant to a resolution adopted on December 31, 1934, and ordered to be paid by checks to be mailed on that date. Such dividend and the check therefor was not received either by the petitioner or the estate until subsequent to January 1, 1935, and was not subject to control of the petitioner or the estate during the taxable period. [27]

F. The item of interest deduction disallowed in the sum of \$1,901.96 is interest paid on indebtedness of the taxpayer represented by a note to a bank, which was an obligation of the taxpayer incurred for a valuable and adequate consideration. Such interest was actually paid within the year and should be allowed.

G. The decedent, representing the community estate, was a member of a partnership known as Burrows Motor Company of Yakima, Washington. Upon the death of A. E. Larson the surviving partner, Grover Burrows, purchased such entire community interest in certain of the assets of said partnership at the valuation placed on said partnership and the assets thereof in the appraisal of decedent's estate, which was the same figure used as the value of such assets and interest for estate tax purposes. There was, therefore, no gain or loss upon the sale of the community one-half belonging to the deceased, but the basis of the community one-half belonging to decedent's widow, Rose B. Larson, exceeded the selling

price to the extent of at least \$17,213.83. If there is includable in petitioner's income for the taxable year any part of the income of the estate of A. E. Larson representing petitioner's one-half community interest therein, then the amount of such loss should properly be allowed as a deduction to the petitioner. [28]

H. The net income of \$32,132.38 reported by petitioner upon her original return included the sum of \$1,570.00 dividends on stock of Surety Finance Company of Yakima which were erroneously treated as accrued on June 7, 1934, the date of death of petitioner's husband, A. E. Larson, but which in fact were neither declared nor paid prior to that date. Such dividends were not received by petitioner but were received by the executor of the estate of A. E. Larson and should be eliminated from petitioner's taxable income.

Wherefore, petitioner prays that this Board hear and determine this proceeding and find that respondent has erred in respect to the matters above set forth and redetermine petitioner's liability accordingly.

H. B. JONES

GEORGE KINNEAR

Counsel for Petitioner

State of Washington,
County of King—ss.

Rose B. Larson, being first duly sworn, upon oath deposes and says: That she is the petitioner above named; [29] that she has read the foregoing amended petition, is familiar with the statements therein contained and believes the same to be true and correct.

ROSE B. LARSON

Subscribed and sworn to before me this 7th day of August, 1940.

WINONA DAY

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Nov. 12, 1940. [30]

[Title of Board and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits that the taxes in controversy are income taxes for the calendar years 1933 and 1934, but denies that the amount in controversy is as alleged in paragraph 2 of the amended petition.

3. A and B. Denies the allegations contained in subparagraphs A and B of paragraph 3 of the amended petition.

4. A and B. For lack of information and knowledge sufficient to form a belief, denies the allegations contained in subparagraphs A and B of paragraph 4 of the amended petition. [31]

5. A to H. inclusive. Denies that the Commissioner erred as alleged in subparagraphs A to H, inclusive, of paragraph 5 of the amended petition.

6. A. Admits that upon the death of petitioner's husband, A. E. Larson, on June 7, 1934, his will was submitted to probate in the Superior Court of the State of Washington for Yakima County on June 13, 1934, and an executor appointed; admits that all of the property owned by decedent or petitioner was community property and under the law of the State of Washington petitioner's one-half community interest was subject to control and administration by the executor and the probate court during all of the taxable year, as alleged in subparagraph A of paragraph 6 of the amended petition; denies the remaining allegations contained in said sub-paragraph A of paragraph 6 of the amended petition.

B to E, inclusive. Denies the allegations contained in subparagraphs B to E, inclusive, of paragraph 6 of the amended petition.

F and G. For lack of information and knowledge sufficient to form a belief, denies the allegations contained in subparagraphs F and G of paragraph 6 of the amended petition.

H. Denies the allegations contained in subparagraph H of paragraph 6 of the amended petition.

[32]

7. Denies generally and specifically each and every material allegation contained in the amended petition, not hereinbefore specifically admitted, qualified or denied.

As an alternative defense to the allegation of error contained in paragraph 5 D of the amended petition the respondent alleges:

That in case the Board finds for the petitioner, based upon the error and facts alleged in paragraphs 5 D and 6 D of the amended petition, and holds that any number of shares of Sunshine Mining Company stock less than 42,500 was sold out of the community interest of the petitioner, Rose B. Larson, an addition to taxable income should be made, representing the dividends received by the petitioner on shares unsold. The resulting tax on such income is hereby claimed.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

J. P. WENCHEL,

Chif Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

B. H. NEBLETT,

Special Attorney,

Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 12, 1940. [33]

[Title of Board and Cause.]

REPLY

Comes now the petitioner, Rose B. Larson, by her attorney, George Kinnear, and for reply to the affirmative allegations in the answer to amended petition filed by respondent herein declares as follows:

7.

Petitioner denies generally and specifically each and every material allegation contained in the "alternative defense to the allegation of error contained in Paragraph D 5 of the amended petition"

as set forth in the last paragraph of respondent's reply on page 3 thereof.

(s) GEORGE KINNEAR

Of Counsel for Respondent

Copy served on respondent.

G. D. W.

[Endorsed]: Filed Nov. 12, 1940. [34]

United States Board of Tax Appeals

Docket No. 88813

ROSE B. LARSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 88814

ESTATE OF A. E. LARSON, Deceased, Shirley D.

Parker, Adminis. de bonis non with the Will
annexed,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION OF FACTS

It is mutually stipulated and agreed, by and between the parties hereto, by their respective counsel, that the following facts may be taken as true by the

Board with the reservation that this stipulation shall be without prejudice to the right of either party to introduce further evidence not inconsistent with the facts herein stipulated. [35]

1. The claims of the petitioners for the year 1933, based upon the errors and facts alleged in paragraphs 3(a) and 4(a) of the amended petition in Docket No. 88813, and paragraphs 4(a) and 5A of the amended petition in Docket No. 88814, relating to the disallowance of community bad debts due from the Daisy Mining and Milling Company in the amount of \$14,722.00 from E. J. Morgan amounting to \$500.00, and from Kaplan Brothers amounting to \$50.00, are hereby waived by petitioners. Petitioners concede that said debts did not become uncollectible and worthless during the taxable year 1933 and are not deductible by them in said year.

2. The claim of the petitioners for the years 1933 and 1934, based upon the errors and facts alleged in paragraphs 3(b) and 4B and 6C of Docket No. 88813, and paragraphs 4(b) and 5B of Docket No. 88814, relating to increase in community rentals (depreciation) is conceded by the respondent. Respondent concedes that petitioners are entitled to depreciation on the basis of the lives claimed in paragraphs 4B and 5B of the amended petitions filed in Docket Nos. 88813 and 88814, respectively, for 1933 and 1934.

3. The claim of the petitioner in Docket No. 88813 for the year 1934, based upon the error and facts alleged in paragraphs 5(g) and 6G of the

amended petition, regarding an allowance of \$17,213.83, relating to a disposition of a partnership interest in the Larson-Burrows partnership is hereby conceded by the respondent, provided that the Board holds that the petitioner, as the surviving spouse of a marital community, is [36] taxable upon her one-half of the community income earned during the period of administration, contrary to the contention of the petitioner as alleged in paragraph 5(a) of the amended petition in Docket No. 88813.

4. In case the Board holds for the petitioner in respect to the error alleged in said paragraph 5(a) of the amended petition in *Rose B. Larson*, Docket No. 88813, for the year 1934, then the amount of \$17,213.83, referred to in paragraph 3 of this stipulation, is a proper deduction from community income as alleged in paragraph 4E of the petition in the case presently pending before this Board entitled *Estate of A. E. Larson*, Docket No. 104214, provided the Board holds for the respondent and contrary to petitioner's allegation of error in paragraph 4F of the petition filed in said case, which case is not set for hearing on the Board Calendar at this time.

(Sgd.) H. B. JONES

Counsel for Petitioner

(Signed) J. P. WENCHEL

Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

[Title of Board and Cause—Docket Nos. 88813, 88814.]

Promulgated July 24, 1941.

1. Petitioner is the surviving spouse of decedent, who died testate in the taxable year leaving a large estate consisting entirely of community property. Decedent and his wife were residents of the State of Washington. The estate was in administration throughout the taxable year. Held, that community property interest, rents, and dividends received by the executor of decedent's estate during administration are taxable to the estate in toto and no part thereof to the surviving spouse. *Barbour v. Commissioner*, 89 Fed. (2d) 474 followed.

2. During the taxable year the executor of the estate sold 85,000 shares of certain stock. Held, that the executor sold the shares from decedent's interest and that no part of the gain realized on the sale is taxable to petitioner.

3. Petitioner and her son signed notes as comakers, thereby obtaining loans totaling \$58,000. The loans were obtained entirely on the credit of petitioner and the proceeds were immediately turned over to petitioner's son. Petitioner subsequently made a gift of the proceeds of the loans to her son. Held, the interest paid on the loans in the taxable year by petitioner is deductible by her.

H. B. Jones, Esq., and George C. Kinnear, Esq., for the petitioners.

B. H. Neblett, Esq., and Clyde R. Maxwell, Esq., for the respondent.

Respondent determined a deficiency of \$2,043.98 in the income tax of each petitioner for the year 1933 and a deficiency in income tax of petitioner Rose B. Larson for the year 1934 in the sum of \$69,243.49. The primary issue is whether income on community property received by the executor of the estate of the deceased husband of petitioner Rose B. Larson during the period of administration is taxable entirely to the estate or is taxable one-half to the estate and one-half to her. The second, third, and fourth issues relate to the taxability of com- [38] munity interest, rents, and dividends, respectively, which were received by the executor of the estate of the deceased husband of petitioner Rose B. Larson during the period of administration. The fifth issue is whether or not petitioner Rose B. Larson is taxable on gain from the sale of certain stock by the executor of the estate of her deceased husband during the period of administration. The final issue involves an interest deduction.

By stipulation of the parties filed at the hearing issues relating to bad debt losses and depreciation for the year 1933 were eliminated, the former being waived by petitioners and the latter conceded by respondent. The deficiencies resulting from the stipulation of the parties will be determined in re-

computation under Rule 50. The issues remaining for the Board's determination relate only to the income tax liability of petitioner in Docket No. 88813 for the year 1934. The proceedings were consolidated for hearing.

FINDINGS OF FACT.

Rose B. Larson, hereinafter referred to as petitioner, is the surviving wife of Adelbert Larson, the administrator de bonis non of whose estate is petitioner in Docket No. 88814. Adelbert E. Larson, hereinafter referred to as decedent, died testate on June 7, 1934. Under decedent's will executed May 31, 1934, the Yakima First National Bank of Yakima, Washington, hereinafter referred to as executor, was appointed executor.

On June 13, 1934, decedent's will was admitted to probate and the bank duly qualified as executor. The executor employed a firm of attorneys to attend to legal matters arising in connection with the estate. At the request of petitioner the executor also employed Shirley D. Parker, petitioner's son, at a salary of \$1,000 a month, to perform services relating to administration of the estate.

Under date of June 14, 1934, petitioner, as surviving wife of decedent, petitioned the court, sitting in probate, for a widow's allowance. The petition stated:

3.

That no inventory and appraisement has yet been made, but that the value of said estate,

consisting of the community property of the decedent and your petitioner, is approximately \$1,500,000.00.

4.

That it is necessary that your petitioner have an allowance for her support and maintenance, and that \$5000.00, cash, and the further sum of \$1500.00 a month, payable monthly, is a reasonable, proper and necessary amount to maintain and support the petitioner and the family residence of the decedent and your petitioner in the manner to which she has been accustomed:

On the same date the court ordered the executor to pay petitioner the sums requested in her petition “until the further order of this court * * *.”

At the time of decedent's death all the real and personal property owned by petitioner and decedent was community property. The value of this property, including the interest of petitioner as appraised by duly appointed appraisers of decedent's estate, was \$2,353,480.79. Included in the community property of petitioner and decedent were 210,974 shares of stock of the Sunshine Mining Co.

Decedent's will provided for legacies aggregating \$482,000 and named petitioner residuary legatee. It also provided:

Seventeenth: The executor of my estate shall have three years if necessary to liquidate enough property to pay all of the above bequests.

Claims filed against decedent's estate totaled \$112,140.51.

At the time of his death decedent was president of the Sunshine Mining Co. Prior to his death a plan had been discussed with regard to listing the stock of Sunshine Mining Co. on the New York Curb Exchange. Decedent had not been in favor of the plan. The plan had for its purpose the enhancing of the value of the mining company's stock. After decedent's death the plan was again considered. It was initiated by Carl M. Stolle of Grande, Stolle & Co., who was associated with Walter Seligman of New York City, the owner of a large block of stock in the Sunshine Mining Co.

Stolle approached the president of the bank in regard to the participation of the estate of decedent in the listing plan and stated that a certain number of shares would have to be optioned and sold by the four majority shareholders of the mining company in order that the plan might be a success. The shares which Stolle wished to purchase and obtain options to purchase amounted to approximately 40 percent of the total shares held by the four shareholders. The shareholders who were asked to participate in the plan were Alexander Miller and wife, Mrs. N. P. Hull, J. B. Cox, and decedent's estate.

On June 30, 1934, the executor of decedent's estate entered into five option agreements covering a total of 70,000 shares of Sunshine Mining Co.

stock. The option agreements were identical, with the exception of the number of shares covered thereby. The provisions of these agreements were as follows:

For and in consideration of the sum of **One** and No/100 Dollars (\$1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase [40] 10,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

This option shall continue in force and effect from the date hereof until four months after the listing of the stock of Sunshine Mining Company on the New York Curb Exchange and in no event beyond the 31st day of December, 1934, at 5:00 o'clock p. m., and on said date, whichever occurs first, this said option and all rights hereunder shall terminate.

The said undersigned does further agree to deposit said stock, to-wit, 10,000 shares, in escrow with the Yakima First National Bank at Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon

its payment to said bank for the account of said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.

It is understood that during the life of this said option the undersigned agrees that it will not sell or dispose of any of its stock now owned in the Sunshine Mining Company, a corporation, except that during the life of this said option said undersigned may sell not to exceed one thousand (1000) shares of its said stock, provided that said Grande, Stolle & Company, a corporation, shall have the first right of refusal of said stock, should the undersigned elect to sell said one thousand shares, or any part thereof.

It is understood that this option is subject to the said Grande, Stolle & Company, a corporation, appointing an engineer, receiving said engineer's report on said Sunshine Mining Company's properties and completing the listing of the stock of said Sunshine Mining Company upon the New York Curb Exchange, and this option shall become null and void and of no force and effect in the event the appointment of said engineer, his report and the listing of said stock upon the New York Curb Exchange shall not be completed on or before the first day of September, 1934.

It is understood that in the event said engineer is appointed, his report made, and said listing completed on or before the first day of September, 1934, then in that event this option shall continue in full force and effect for a period of four months from the date of listing said stock on the New York Curb Exchange and not later than the 31st day of December, 1934, at the hour of 5 o'clock p. m., whichever date occurs first and thereafter this agreement shall be null and void.

Each of the option agreements was accompanied by a letter of escrow instructions. The certificates of stock enumerated by the option agreements and escrow instructions were as follows:

Certificate No.	Shares	Certificate No.	Shares
601.....	10,000	739.....	5,000
633.....	10,000	1346.....	30,000
654.....	5,000	2822.....	5,000
736.....	5,000		

These certificates, together with option agreements and escrow instructions, were deposited with the Yakima First National Bank in escrow on June 30, 1934. Similar option agreements were entered into between Grande, Stolle & Co. and the other three majority shareholders. [41]

Petitioner and her son, Shirley D. Parker, left for a trip to California on June 14, 1934, and did not return to Yakima until about the middle of July 1934. Neither petitioner nor her son knew of the option transactions until after their return from

California. Upon her return from California in July 1934, petitioner requested that all matters affecting her interest in decedent's estate be handled by Parker.

Parker was advised of the options granted by the executor. On July 26, 1934, with Parker's consent and approval, the executor petitioned the Probate Court for authority to grant options to purchase the 70,000 shares of stock (which the executor had already optioned) and to sell immediately 10,000 shares of that stock. In its petition the executor stated:

That it is necessary that some part of the personal property of said estate be sold to pay the specific bequests provided in the will herein, and that your petitioner believes that said offer of the Grande, Stolle & Company is the best offer that could be received for a portion of said stock in the Sunshine Mining Company;

* * * * *

On the same date the court entered an order containing the following provisions:

Now, therefore, it is ordered that the executor be and it is hereby authorized to carry out such agreement of sale to said Grande, Stolle & Company as outlined in said petition; and it is further

Ordered that all acts of said executor heretofore done in connection therewith are hereby fully and completely ratified and approved.

On July 31, 1934, the executor petitioned the court for authority to sell to Grande, Stolle & Co. 5,000 shares of Sunshine Mining Co. stock in addition to the 10,000 shares already authorized to be sold. On the same date the court entered an order containing the following provisions:

Now, therefore, it is ordered that the executor be and it is hereby authorized to sell 15,000 shares of stock of the Sunshine Mining Company for the net price of \$5.82½ per share; and

It is further ordered that this order shall supersede the order made on the 26th day of July, 1934, insofar as the sale of 10,000 shares of stock *were* concerned, but shall have no effect upon the order permitting the executor to grant an option to said Grande, Stolle & Company for the sale of 70,000 additional shares.

On August 2, 1934, the estate received the sum of \$87,375 from the sale of 15,000 shares of stock of Sunshine Mining Co. The 70,000 shares covered by the five option agreements were sold at intervals throughout the year 1934, the estate receiving therefor a total sum of \$483,000. The shares sold under the options were [42] those represented by the certificates enumerated in the option agreements.

Neither petitioner nor Parker ever gave permission to sell any of petitioner's one-half interest in the community property belonging to the estate of

decedent and petitioner. There was no understanding that petitioner's one-half interest was affected by the stock sales.

Under date of May 1, 1935, the executor of decedent's estate filed with the Probate Court a petition for partial distribution, stating as follows:

1.

That the final report of your petitioner as executor herein is on file and that such final report, together with the inventory shows that included within the estate herein was a total of 210,974 shares of capital stock of Sunshine Mining Company, a corporation, of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, shares to the number of 125,974, of which said shares Rose B. Larson, as surviving spouse, is the owner of 105,487.

2.

That the said Rose B. Larson, as surviving spouse, desires to have distributed to her 15,000 shares of said stock and that your petitioner, therefore, prays for an order of the court permitting and authorizing it to distribute to the said Rose B. Larson forthwith, 15,000 shares of stock of Sunshine Mining Company.

On the same date the court entered an order containing the following provisions:

* * * it appearing to the court that included within the assets of the above entitled estate was an aggregate of 210,974 shares of the capital stock of the Sunshine Mining Company and that all of said property was community property of the decedent and Rose B. Larson, his widow, and

It further appearing that said Rose B. Larson is entitled, as her share of the community property, to receive from said executor, upon the closing of said estate, a total of 105,487 shares, and no good reason appearing why a partial distribution should not at this time be made.

Now, therefore, it is ordered that the Executor herein be and it is hereby authorized and directed to distribute to said Rose B. Larson 15,000 shares of the Sunshine Mining Company, a corporation.

On July 2, 1934, the estate of decedent received a dividend of \$3,600 from the Surety Finance Co. of Yakima, Washington. In her income tax return for the year 1934 petitioner included the sum of \$1,570 representing one-half the sum of \$3,140, the amount of the dividend which had accrued at the date of death of decedent.

On December 19, 1934, the board of directors of the Surety Finance Co. declared a dividend payable on December 31, 1934. A check in the sum of \$3,600, payable to the order of decedent's estate, was issued

December 31, 1934, in payment of dividends on stock of the [43] Surety Finance Co. held by the estate. The check cleared through the bank on January 2, 1935. In the notice of deficiency respondent treated this payment as received December 31, 1934, and increased petitioner's gross income for the taxable year 1934 by \$1,800.

In his notice of deficiency relating to petitioner's income tax for the year 1934 respondent added to petitioner's gross income \$2,374.68, representing one-half of the interest on obligations held by the community which was received by decedent's estate during the period from June 7 to December 31, 1934. Respondent also added to petitioner's gross income for 1934 the sum of \$9,782.49 representing one-half of rentals of community property received by decedent's estate in the period from June 7 to December 31, 1934. Respondent increased petitioner's gross income for 1934 by the sum of \$33,453.64 representing one-half the amount of dividends from community property stock received by the estate of decedent from June 7 to December 31, 1934.

After decedent's death and during the year 1934 petitioner and Parker signed notes aggregating \$58,000 as comakers, thereby obtaining loans from the Yakima First National Bank. The loans were made entirely on the credit of petitioner and the proceeds were turned over to Parker, who used them for his own purposes. On December 20, 1934, interest on these notes in the sum of \$1,551.96 was

deducted by the bank from petitioner's bank balance. In a proceeding involving gift tax brought before this Board by petitioner for the year 1935 petitioner and respondent stipulated that petitioner made a gift of the proceeds of the loans to Parker in 1935 and petitioner paid a gift tax thereon. In her income tax return for the year 1934 petitioner deducted interest on the \$58,000 notes in the sum of \$1,901.96. Respondent disallowed the deduction.

The estate of decedent was in administration throughout the taxable year 1934. Petitioner kept her accounts and filed her returns on the cash basis. Petitioners' returns were filed with the collector for the district of Washington.

OPINION.

Hill: The first issue is basic and its determination will affect most of the other questions before us in this proceeding. This issue concerns the treatment for income tax purposes of income from community property received by the estate of decedent during the period of administration of the estate. Petitioner contends that all such income received by the estate should be reported as income of the estate by the fiduciary representing the estate. Respondent con- [44] tends that the community income received by the estate is taxable one-half to the estate and one-half to the survivor of the community.

Petitioner and respondent do not differ on the question of whether petitioner as surviving spouse

has a vested interest in the community property. Respondent argues, however, that, since petitioner had a vested interest in the property, the income should be taxed to her. Petitioner's contention is that regardless of the fact that she had a vested interest in the property she was not entitled to its income during the period of administration. The applicable Federal statutes are section 161 (a) (3) and section 162 (c) of the Revenue Act of 1934.¹

¹Sec. 161. Imposition of Tax.

(a) Application of Tax.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

State laws concerning the phase of community property here under consideration are sections 1342 and 1419 of Remington's Revised Statutes of Washington.²

²§1342. Descent of Community property.—Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration. * * *

§1419. Community property, how administered.—A surviving spouse shall be entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse, for such time and

The courts of the State of Washington have long adhered to the rule that on the death of either husband or wife the whole of the community property is subject to administration as the estate of the de-[45] ceased spouse. *Ryan v. Fergusson*, 3 Wash. 356; 28 Pac. 910; *In re Guye's Estate*, 54 Wash. 264; 103 Pac. 25; *F. T. Crowe & Co. v. Adkinson Construction Co.*, 67 Wash. 420; 121 Pac. 841; *Stanton v. Everett Trust & Savings Bank*, 145 Wash. 165; 259 Pac. 10. Thus the entire income on community property during the period of administration is receivable by the estate.

We are of the opinion that the entire income from community property of decedent and petitioner during the period of administration was taxable to the estate. The instant case is not distinguishable from *Barbour v. Commissioner*, 89 Fed. (2d) 474. There community property stock was sold after the death of the husband but during the period of administration of his estate. The Circuit Court of Appeals for the Fifth Circuit held that income received by the administrator of the estate during the period of administration was taxable in its entirety to the estate. We have recently approved this rule. *Estate of Lucile Gruy*, 42 B. T. A. 1279. We have shown above that the Wash-

in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or that he or she has in writing waived the right to administer upon such community property. * * *

ington authorities have laid down the rule that community property is subject to administration as the estate of deceased spouse. Those cases do not differ materially from the Texas authorities relied upon by the court in the Barbour case. Respondent cites the case of *George Drumheller*, 27 B. T. A. 209, for the proposition that one-half of the community income is taxable to petitioner. In that proceeding, however, the instant problem was not before us. That case is not controlling because the specific question we are now considering was not in controversy.

This was not the case of "a nonintervention will" in which, upon a showing of solvency, the estate may be administered without court approval. Here each sale and distribution required court sanction and petitioner could only receive the income in question as a distribution from the estate. The facts of the case at bar present petitioner's view in the strongest possible light. Since the community property was subject to administration and income therefrom was receivable by the estate during administration, we believe it would be contrary to the intentment of section 161 (a) (3) of the Revenue Act of 1934 to tax any part of that income to petitioner. In spite of petitioner's vested interest in the property, she had no right to the income during the taxable year. We hold that the income from community property subject to administration is taxable in its entirety to the estate of decedent during the period of administration.

The second and third issues relating to interest on obligations and rentals from property held by the community are necessarily determined by our decision on the first issue. We hold that no part of the sum of \$2,374.68, interest, nor the sum of \$9,782.49, rentals, which respondent included in petitioner's gross income, is taxable to peti- [46] tioner. The entire amounts are includable in income of the decedent's estate.

The next issue is whether or not any portion of the dividends on community stock is taxable to petitioner. This question is also determined by our disposition of the first issue. Petitioner contends, however, that she erroneously reported the sum of \$1,570 in gross income for the year 1934. The amount reported on her return represents one-half the sum of \$3,140, which is the portion of a \$3,600 dividend of the Surety Finance Co. which might be said to have accrued at the date of decedent's death. Since the dividend was not received until after the estate was in administration, no part of the dividend should have been included in petitioner's gross income. We hold that petitioner should not have included this amount in her 1934 income tax return.

In connection with this issue petitioner made a contention concerning the taxability of the proceeds of a dividend check in the sum of \$3,600, dated December 31, 1934. This contention turned upon whether or not the check was actually received during the taxable year. Because of our determination of the first issue, we need not consider whether the

check was actually received in the taxable year or in the year 1935.

The fifth issue is whether or not petitioner is taxable on gain from the sale of one-half of 85,000 shares of Sunshine Mining Co. stock which were sold by the estate of decedent in the taxable year. Petitioner contends that the shares sold came entirely from the interest of the estate. Respondent argues that it was the intent of the executor to sell shares from petitioner's interest as well as that of decedent's estate. He urges that the listing plan contemplated the sale and option of about 40 percent of each of four shareholders' holdings and that this intent would not be satisfied unless 40 percent of the entire holdings of the Sunshine Mining Co. stock in the hands of the executor was subject to option and sale. Respondent further argues that there was no immediate need for the sale of the stock, since the will of the decedent permitted the executor to have three years to liquidate the estate in order to pay bequests.

We are of the opinion that the shares in question were sold from the interest of decedent. We are convinced that petitioner gave neither actual nor tacit consent to the sale of shares from her interest. Although Parker, as her agent, approved the action of the executor in optioning the shares, it must be remembered that petitioner was residuary legatee and vitally interested in the preservation of the worth of the estate. Testimony at the hearing clearly indicated that the options and sales were to

enhance the value of the remaining shares in addition to obtaining funds for the payment of legacies.

[47]

The executor of the estate petitioned for the Probate Court's permission to option and sell the shares for payment of bequests. No citation of cases is necessary to demonstrate that petitioner's interest could not be sold to pay bequests under decedent's will. Although three years for liquidation of property to pay bequests was allowed to the executor under the will, it was certainly discretionary with the executor, after obtaining court approval, to liquidate a portion of the estate at an early date.

The factors which show undeniably that the interest in shares sold was that of the estate alone are the petition and order for partial distribution of the estate. The order of the court stated that "said Rose B. Larson is entitled, as her share of community property, to receive from said executor, upon the closing of said estate, a total of 105,487 shares." Since the entire community interest in the Sunshine Mining Co. shares aggregated 210,974 shares, the court's order indicates that one-half of the original number of shares was treated as the property of petitioner after the sale of 85,000 shares had been made. We consider the court's order a finding behind which we can not inquire. The Probate Court's determination, as evidenced by its order, must be binding as to which interest was disposed of by the options and sales. *Helvering v. Rhodes*, 117 Fed. (2d) 509. See *Mildred M. Hubbard*, 30 B. T. A. 619. Accordingly, we hold that no portion of the 85,000

shares optioned and sold by the executor of decedent's estate was sold from petitioner's interest. Respondent's determination was erroneous and is hereby overruled.

In connection with this issue respondent has urged an alternative contention that, in the event we find that the shares sold were not petitioner's, then she must be taxed upon dividends paid on her stock subject to administration. In the first issue we held that dividends paid on petitioner's stock in the hands of the executor were not taxable to petitioner while the stock was subject to administration. That issue disposes of respondent's alternative contention here.

The final issue is whether or not petitioner is entitled to a deduction for interest paid in the sum of \$1,901.96. Respondent contends that the obligations upon which the interest was paid were incurred by petitioner's son and that the interest is not deductible by petitioner. He argues that petitioner voluntarily satisfied the obligations of another.

Petitioner's obligation as comaker of the notes was both joint and several. The notes were at all times her personal obligations and amounts paid by her as interest must be considered interest paid on her indebtedness. *George A. Neracher*, 32 B. T. A. 236. Nor does the fact that petitioner later made a gift to her son of the amount [48] borrowed change the result. Petitioner, however, has proved payment of only \$1,551.96 as interest. Mere accrual of \$350 interest does not give rise to a deduction in that amount to a taxpayer on a cash basis. We hold that

respondent should have allowed petitioner a deduction of \$1,551.96 for interest paid in the taxable year.

Upon recomputation we shall give effect to the stipulations filed at the hearing disposing of issues relating to Docket No. 88814 and the issues relating to Docket No. 88813 for the year 1933.

Decision will be entered under Rule 50. [49]

United States Board of Tax Appeals

Docket No. 88813

ROSE B. LARSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated July 24, 1941, it is

Ordered and Decided: That for the years 1933 and 1934 there are deficiencies in income tax in the amounts of \$1,452.74 and \$52.91, respectively.

Enter:

Entered Nov. 13, 1941.

(Seal) (S) SAM B. HILL,

Member.

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A. Docket No. 88813.

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

vs.

ROSE B. LARSON,

Respondent on Review.

PETITION FOR REVIEW AND
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of
Internal Revenue, by his attorneys, Samuel O. Clark,
Jr., Assistant Attorney General, J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue, and
Claude R. Marshall, Special Attorney, Bureau of
Internal Revenue, and respectfully shows:

I.

JURISDICTION

That the petitioner on review (hereinafter re-
ferred to as the Commissioner) is the duly ap-
pointed, qualified and acting Commissioner of In-
ternal Revenue, appointed and holding his office by
virtue of the laws of the United States; that the re-

spondent on review, Rose B. Larson, (hereinafter called the taxpayer), is an individual residing at Yakima, Washington, and filed an individual income tax return for the taxable year ended December 31, 1934, in the office of the Collector of Internal Revenue for the District of Washington, located at Seattle, Washington, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals pursuant to the provisions of Sections 1141 and 1142 of [51] of the United States Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On January 27, 1937, the Commissioner in accordance with Section 272(a) of the Revenue Act of 1934 advised the taxpayer by registered mail that the determination of her income tax liability for the taxable year 1934, disclosed a deficiency in tax of \$69,243.49. Thereafter, on April 23, 1937, taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals. The Commissioner filed his answer to the petition on May 17, 1937. The case was heard on November 12, 1940, at which time an amended petition and an answer to the amended petition were filed by the parties hereto. On July 24, 1941, the Board of Tax Appeals promulgated its findings of fact and opinion; and

on November 13, 1941, the Board of Tax Appeals entered its decision, ordering and deciding that there is a deficiency in income tax for the year 1934 in the amount of \$52.91.

III.

NATURE OF CONTROVERSY

The questions presented for review are succinctly stated as follows:

1. Where taxpayer, a surviving spouse, and her deceased husband, who died on June 7, 1934, were residents of the State of Washington and all their property consisted of community property, and the estate of the decedent was in administration throughout the remainder of the taxable year 1934,—is the community income consisting of profits, rents, interest and dividends, all of which was received by the executor of the estate, taxable to the estate in toto under the provisions of Section 161(a)(3) of the Revenue Act of 1934, (as contended by the taxpayer and held by the Board); or taxable one-half to the estate and one-half to the taxpayer, (as contended by the Commissioner)?

[52]

2. If the aforesaid community income is taxable one-half to the taxpayer and one-half to the estate, were shares of certain stock sold by the executor during the year 1934 all from the interest of the decedent in the community property, (as contended by the taxpayer and determined by the Board); or one-half from the taxpayer's interest and one-half from

the decedent's interest, whereby one-half of the profit realized is taxable to the taxpayer, (as contended by the Commissioner)?

Rose B. Larson, "taxpayer" herein, is the surviving wife of Adelbert Larson, who died testate on June 7, 1934. The Yakima First National Bank was duly appointed the executor of the decedent's estate. The taxpayer and the decedent were residents of the State of Washington, one of the States having what is commonly known as "community property laws". The estate of the decedent was in administration throughout the taxable year 1934; and under the practice of the said State of Washington, the whole community property was subjected to administration by the decedent's estate.

On August 2, 1934, the estate received the sum of \$87,375.00 from the sale of 15,000 shares of stock of the Sunshine Mining Company; and during the remainder of the year 1934, it received \$483,000.00 from the sale of 70,000 shares of said stock, which resulted in an aggregate taxable profit of \$272,187.50. On July 2, 1934, the estate received a dividend of \$3,600.00 from the Surety Finance Company (of Yakima), of which \$3,140.00 was accrued at the date of death of decedent. On December 19, 1934, the board of directors of the Surety Finance Company declared a dividend payable on December 31, 1934 and a check in the amount of \$3,600.00, payable to the order of the estate, was issued December 31, 1934, in payment of dividends on stock of the said corporation held by the estate. The

estate also received interest in the amount of \$4,749.36 [53] on obligations held by it; rentals in the amount of \$19,564.98 from community property, and dividends in the amount of \$66,907.28 from other community property. The taxpayer reported only one-half of the sum of \$3,140.00 on her return for 1934, and the Commissioner included in her taxable income one-half of each of the other items of income received by the estate on the theory that one-half of the community income received by the estate during this period of administration was taxable to the surviving spouse under Section 161(a)(3) of the Revenue Act of 1934. The Commissioner also treated the dividend check in the amount of \$3,600.00 as having been received in 1934, although it cleared through the bank on January 2, 1935; also that one-half of the 85,000 shares of Sunshine Mining Company stock sold was from the taxpayer's interest in the community property, and that the dividends paid in respect to such shares disposed of were not includable in her income for 1934.

The Board of Tax Appeals held that the entire income from the community property of decedent and taxpayer during the period of administration was taxable to the estate and not to the taxpayer. The Board of Tax Appeals also determined that all the 85,000 shares of stock of the Sunshine Mining Company sold in 1934 came entirely from the interest of the estate, but refused to readjust the dividend income consequentially taxable to the tax-

payer, as alternatively pleaded by the Commissioner; likewise, holding all such income taxable to the estate.

The Commissioner submits that the decision of the Board of Tax Appeals in respect to the taxation of the entire community income to the estate is contrary to the law and the established practice of the Bureau of Internal Revenue. Although the Board recognized that the taxpayer had a vested interest in one-half of the community property, nevertheless its decision in effect divests her of that interest by taxing the entire income to the estate contrary [54] to the Revenue laws and Treasury Regulations.

The Board, in respect to the second question, held that neither the taxpayer nor Parker, her representative, ever gave permission to the executor to sell any of taxpayer's one-half interest in the community property belonging to the estate of the decedent and taxpayer. The Board concluded from the record, especially from the petition and order for partial distribution of the estate, that the interest in the shares sold was that of the estate alone.

The Commissioner submits that the evidence of record discloses that it was the intent of the parties, including the executor, to sell shares from taxpayer's interest as well as that of decedent's estate; that the listing plan contemplated the sale and option of about 40% of each of the four shareholders' holdings, and that this intent would not be satisfied unless 40% of the entire holdings of the Sunshine Mining Company stock in the hands of

the executor was subject to option and sale; that there was no immediate need to liquidate the estate to pay bequests; and that the petition and order of partial liquidation, prepared by attorneys for the executor, when considered with the other facts of record, do not negative the fact that the 85,000 shares sold included one-half of the taxpayer's interest in said shares; and that a Probate Court cannot authorize and make a distribution of property not in existence—if said orders of the said Probate Court are construed to have distributed the shares of the taxpayer already sold.

If this Honorable Court holds that the taxpayer is taxable on one-half of the income of the community property received during the period of administration, then the case should be remanded to the Board for further consideration of the collateral and alternative matters not decided by it, in view of its decision upon the primary issue involved. [55]

IV.

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue, being aggrieved by the opinion and decision of the United States Board of Tax Appeals in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Board, which are relied upon by

the Commissioner as the basis of this petition for review, are as follows:

That the Board of Tax Appeals erred:

1. In holding and deciding that the income on community property received by the executor of the estate during the period of administration is taxable entirely to the estate.

2. In failing to hold and decide that the income on community property received by the executor of the estate during the period of administration is taxable one-half to the taxpayer, the surviving spouse, and one-half to decedent's estate.

3. In holding and deciding that taxpayer's one-half of the community income was received by the estate within the meaning of Section 161(a)(3) of the Revenue Act of 1934.

4. In holding and deciding that, in spite of taxpayer's vested interest in the community property, she had no right to any share of the income during the taxable year.

5. In holding and deciding that no part of the sum of \$2,374.68, representing one-half of the interest on obligations held by the community which was received by the decedent's estate during the period June 7 to December 31, 1934, is taxable to the taxpayer in the taxable year 1934. [56]

6. In holding and deciding that no part of the sum of \$9,782.49, representing one-half of rentals of community property received by the decedent's estate in the period from June 7 to December 31,

1934, is taxable to the taxpayer in the taxable year 1934.

7. In holding and deciding that no part of the sum of \$33,453.64, representing one-half of the amount of dividends from community property stock received by the decedent's estate from June 7 to December 31, 1934, is taxable to the taxpayer during the taxable year 1934.

8. In failing to hold and find that a dividend check in the amount of \$3,600.00, issued to the decedent's estate on December 31, 1934, was received by the executor of the estate in the taxable year ended December 31, 1934.

9. In holding and deciding that no part of the sum of \$1,800.00, representing one-half of a dividend check issued to the decedent's estate on December 31, 1934, is taxable to the taxpayer in the taxable year 1934.

10. In holding and deciding that taxpayer should not have included in her income for the taxable year 1934 the sum of \$1,570.00, representing one-half of the amount of a dividend of the Surety Finance Company received by the decedent's estate on July 2, 1934, which had accrued at the date of death of decedent.

11. In holding and finding that no portion of the 85,000 shares of Sunshine Mining Company stock optioned and sold in 1934 by the executor of the decedent's estate was sold from taxpayer's interest in the community property, there being substantial

evidence to support a contrary holding and finding.

12. In failing to hold and find that one-half of the 85,000 shares of Sunshine Mining Company stock optioned and sold by the executor of the decedent's estate during 1934 was from the taxpayer's interest in the community property. [57]

13. In failing to hold and decide that one-half of the profit realized in the year 1934 in the amount of \$272,187.50 from the sale of 85,000 shares of Sunshine Mining Company stock by the decedent's estate is taxable to the taxpayer for the taxable year 1934, subject to statutory percentage limitations.

14. In holding and finding that the taxpayer gave neither actual nor tacit consent to the sale of one-half of the 85,000 shares of Sunshine Mining Company stock from her interest, there being no substantial evidence to support such a holding and finding, but there being substantial evidence to support a contrary holding and finding.

15. In holding and finding that neither the taxpayer nor her representative Parker ever gave permission to sell any of taxpayer's one-half interest in the community property belonging to the estate of decedent and the taxpayer, there being no substantial evidence to support such a holding and finding, but there being substantial evidence to support a contrary holding and finding.

16. In failing to hold and find that the taxpayer and her representative Parker gave permission and consent to the executor of the decedent's estate to

option and sell 42,500 shares of Sunshine Mining Company stock in 1934 from her interest of the said stock in the community property of the taxpayer and the decedent, there being substantial evidence to support such a holding and finding.

17. In failing to hold and find that one-half of the 85,000 shares of Sunshine Mining Company stock optioned and sold by the executor of the decedent's estate in 1934 were shares from the taxpayer's interest in the community property, there being substantial evidence to support such a holding and finding.

18. In holding and considering that the order of the Probate Court, under the circumstances, is "a finding behind which it can not inquire". [58]

19. In failing to hold and decide that the Probate Court could distribute by its order only such property as existed in the decedent and the taxpayer.

20. In failing to hold and decide (in the alternative—the Board having found and decided that the entire 85,000 shares of Sunshine Mining Company stock sold were from decedent's interest only) that dividends paid in 1934 on taxpayer's stock in the Sunshine Mining Company in the hands of the executor of the decedent's estate during the period of administration were taxable to her in 1934.

21. In that its opinion and decision are not in accord with the law and the regulations, and are not supported by substantial evidence, but are contrary thereto.

22. In ordering and deciding that for the year 1934 there is a deficiency in income tax in the amount of \$52.91.

23. In failing to order and decide that for the year 1934 there is a deficiency in the amount of \$69,243.49.

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Signed) SAMUEL O. CLARK, JR.

Assistant Attorney General.

(Signed) J. P. WENCHER

Chief Counsel,

Bureau of Internal Revenue,
Attorneys for Petitioner on
Review.

Of Counsel:

CLAUDE R. MARSHALL,

Special Attorney,

Bureau of Internal Revenue.

CRM/csl 2/1942

[Endorsed]: Filed Feb. 2, 1942. [59]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: H. B. Jones, Esq.,
George C. Kinnear, Esq.,
610 Colman Building,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2d day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 2d day of February, 1942.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of February, 1942.

(S) H. B. JONES

(S) GEORGE C. KINNEAR

Counsel for Respondent on Review.

CRM/esl 1/1942.

[Endorsed]: Filed Feb. 11, 1942. [60]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Rose B. Larson,
Beverly Hills, California.
(formerly) Yakima, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2d day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 2d day of February, 1942.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 11th day of February, 1942.

(S) ROSE B. LARSON,
Respondent on Review.

CRM/csl 2/1942

Service is hereby accepted this 11th day of February, 1942. ROSE B. LARSON.

[Endorsed]: Filed Feb. 13, 1942. [61]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Comes Now the Petitioner on Review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

The United States Board of Tax Appeals erred:

1. In holding and deciding that the income on community property received by the executor of the estate during the period of administration is taxable entirely to the estate.

2. In failing to hold and decide that the income on community property received by the executor of the estate during the period of administration is taxable one-half to the taxpayer, the surviving spouse, and one-half to decedent's estate.

3. In holding and deciding that taxpayer's one-half of the community income was received by the estate within the meaning of Section 161(a)(3) of the Revenue Act of 1934.

4. In holding and deciding that, in spite of taxpayer's vested interest in the community property, she had no right to any share of the income during the taxable year.

5. In holding and deciding that no part of the sum of \$2,374.68, representing one-half of the interest on obligations held by the community which was received by the decedent's estate during the period June 7 to December 31, 1934, [62] is taxable to the taxpayer in the taxable year 1934.

6. In holding and deciding that no part of the sum of \$9,782.49, representing one-half of rentals of community property received by the decedent's estate in the period from June 7 to December 31, 1934, is taxable to the taxpayer in the taxable year 1934.

7. In holding and deciding that no part of the sum of \$33,453.64, representing one-half of the amount of dividends from community property stock received by the decedent's estate from June 7 to December 31, 1934, is taxable to the taxpayer during the taxable year 1934.

8. In failing to hold and find that a dividend check in the amount of \$3,600.00, issued to the decedent's estate on December 31, 1934, was received by the executor of the estate in the taxable year ended December 31, 1934.

9. In holding and deciding that no part of the sum of \$1,800.00, representing one-half of a dividend check issued to the decedent's estate on December 31, 1934, is taxable to the taxpayer in the taxable year 1934.

10. In holding and deciding that taxpayer should not have included in her income for the taxable year 1934 the sum of \$1,570.00, representing one-half of the amount of a dividend of the Surety Finance Company received by the decedent's estate on July 2, 1934, which had accrued at the date of death of decedent.

11. In holding and finding that no portion of the 85,000 shares of Sunshine Mining Company

stock optioned and sold in 1934 by the executor of the decedent's estate was sold from taxpayer's interest in the community property, there being substantial evidence to support a contrary holding and finding. [63]

12. In failing to hold and find that one-half of the 85,000 shares of Sunshine Mining Company stock optioned and sold by the executor of the decedent's estate during 1934 was from the taxpayer's interest in the community property.

13. In failing to hold and decide that one-half of the profit realized in the year 1934 in the amount of \$272,187.50 from the sale of 85,000 shares of Sunshine Mining Company stock by the decedent's estate is taxable to the taxpayer for the taxable year 1934, subject to statutory percentage limitations.

14. In holding and finding that the taxpayer gave neither actual nor tacit consent to the sale of one-half of the 85,000 shares of Sunshine Mining Company stock from her interest, there being no substantial evidence to support such a holding and finding, but there being substantial evidence to support a contrary holding and finding.

15. In holding and finding that neither the taxpayer nor her representative Parker ever gave permission to sell any of taxpayer's one-half interest in the community property belonging to the estate of decedent and the taxpayer, there being no substantial evidence to support such a holding and finding, but there being substantial evidence to support a contrary holding and finding.

16. In failing to hold and find that the taxpayer and her representative Parker gave permission and consent to the executor of the decedent's estate to option and sell 42,500 shares of Sunshine Mining Company stock in 1934 from her interest of the said stock in the community property of the taxpayer and the decedent, there being substantial evidence to support such a holding and finding.

17. In failing to hold and find that one-half of the 85,000 shares of Sunshine Mining Company stock optioned and sold by the executor of the decedent's estate in 1934 were shares from the taxpayer's interest in the community [64] property, there being substantial evidence to support such a holding and finding.

18. In holding and considering that the order of the Probate Court, under the circumstances, is "a finding behind which it can not inquire".

19. In failing to hold and decide that the Probate Court could distribute by its order only such property as existed in the decedent and the taxpayer.

20. In failing to hold and decide (in the alternative—the Board having found and decided that the entire 85,000 shares of Sunshine Mining Company stock sold were from decedent's interest only) that dividends paid in 1934 on taxpayer's stock in the Sunshine Mining Company in the hands of the executor of the decedent's estate during the period of administration were taxable to her in 1934.

21. In that its opinion and decision are not in accord with the law and the regulations, and are not supported by substantial evidence, but are contrary thereto.

22. In ordering and deciding that for the year 1934 there is a deficiency in income tax in the amount of \$52.91.

23. In failing to order and decide that for the year 1934 there is a deficiency in the amount of \$60,243.49.

(Signed) SAMUEL O. CLARK, JR.
Assistant Attorney General.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue,
Attorneys for Petitioner on
Review.

CRM/csl

3/20/42

Service of a copy of the within Statement of Points to be relied upon is hereby admitted this 31st day of March, 1942.

H. B. JONES
Attorney for Respondent on
Review.

[Endorsed]: Filed Apr. 28, 1942. [65]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form relating to the statement of points to be relied upon by the Commissioner of Internal Revenue adduced at the hearing of the above-entitled proceeding before the United States Board of Tax Appeals, at Seattle, Washington, on November 12, 1940, Honorable Sam B. Hill, Member of the United States Board of Tax Appeals, presiding. H. B. Jones, Esq., and George C. Kinnear, Esq., represented the taxpayer and B. H. Neblett, and Clyde R. Maxwell, attorneys, represented the Commissioner of Internal Revenue. Thereupon, the case of Rose B. Larson, B.T.A. Docket No. 88813, was consolidated for hearing with the case of the Estate of A. E. Larson, Deceased, B.T.A. Docket No. 88814, which is not involved in this proceeding.

Mr. Neblett in his opening statement for the Government stated, among other things:

“Respondent will show for the year 1934 Mrs. Larson filed a separate return, Number 1040, in which she reported one-half of the community income from January 1st, 1934, to June 7, 1934, and claimed one-half of the deductions for the same period, plus \$1,901.96 additional interest and \$1,125 additional contributions. A return Form #1040 was filed in the name of A. E. Larson, Deceased, [66] for the period January 1, to June 7, 1934, in which

was reported one-half of the community income for the above period and one-half of the deductions for the same period. A return Form 1040 was also filed in the name of A. E. Larson estate for the period June 8 to December 31, 1934, in which was reported the total income received on the community property for that period. Deductions for that period were claimed in the amount of \$32,467.44. Mrs. Larson, in her separate return for the calendar year 1934, reported no income received on community property from the date of the death of her husband, June 7, 1934, to December 31, 1934. She received no income for that period from any separate property nor for any personal services.

The Commissioner included in Mrs. Larson's return for 1934 one-half of the income received on the community property for the period June 7, to December 31, 1934, and adjusted the deductions on a community property basis. The over-assessment reflected of \$1,928.92, in the case of A. E. Larson Estate for the period of June 7, to December 31, 1934, is due principally to eliminating from that return one-half of the income reported and transferring same to Mrs. Larson's separate return.

Now, your Honor, I have carefully detailed the exact steps taken as far as the returns are concerned in this case, so that your Honor may have clearly before you whether this income

is taxable to the fiduciary or to the surviving spouse.

Now, Mr. Jones has referred to the fact that we have taxed both Mrs. Larson and the estate with this income. That is true. The Commissioner first taxed it to Rose B. Larson on the theory that it was her income. The petitioner protested it and the statute was running, so the Commissioner also taxed it to the estate which is the contention made by the opposing counsel at this time."

Thereupon, an agreed stipulation of facts was offered and received in evidence. (A copy of the stipulation, (together with all exhibits annexed thereto,) is made a part of the record on review herein.)

Thereupon,

RUTH BOUCHER HOWELL,

a witness on behalf of the taxpayer, was sworn and testified as follows:

Direct Examination

(By Mr. Jones):

I am secretary to W. E. Lucas at the National Bank of Commerce. I was connected with the Yakima First National Bank in 1934 as secretary to Mr. [67] E. P. Hoffman, who was the trust officer. The Larson Estate was handled in our department and it occupied almost all of our time and attention.

(Testimony of Ruth Boucher Howell.)

There was no one else in the trust department besides Mr. Hoffman and myself. The bank being the executor of the Larson Estate, the trust officers and the senior officers of the bank handled the affairs of the Larson Estate. Mr. Hoffman has since died. I kept all the records of income and disbursements of the Larson Estate. I was familiar with the practice of the bank as to making credits or debits against the account, and as to whether those were customarily made. I handled that sort of thing myself. I had worked in all of the interior departments before going in the trust department. We had a practice of cleaning up our work each day as far as the transactions relative to the trust went. It occupied all of our time and attention, and we tried to keep everything right up currently.

If we received a check by the close of banking hours, which in our case was 3 o'clock, particularly a check drawn on our bank, it was our practice to put that check in that day. We customarily accepted them beyond the close of banking hours somewhat; I would say perhaps within an hour. If we had received a check, say by 4 o'clock on a particular day and that check was on an account which was in our bank, it may not have been entered on our records on that date, but it would have gone to the credit; it would not have been cleared that day. The check itself would not have been cancelled until the following day. The check would go through on that day.

(Testimony of Ruth Boucher Howell.)

Thereupon, a check marked for identification as Petitioner's Exhibit No. 1 was shown the witness.

(The witness continuing): I presume that I have seen that check before. It is endorsed the way the checks for the estate were endorsed. [68]

"Mr. Jones: Well, I might state, your Honor, that the checks is the check of the Surety Finance Company dated at Yakima, Washington, December 31, 1934, 'Pay to the Order of the A. E. Larson Estate \$3600.' I am directing the question as to whether that was a '34 receipt or not.

Mr. Neblett: May I see it a moment?

Mr. Jones: You may.

Mr. Neblett: That is all right."

(Witness continuing):

That check has been cancelled; it was paid on the 2nd of January, 1935. In accordance with the manner in which we handled our affairs of the Larson Estate that would indicate that the check was probably received too late for clearance on the last day of the year.

"Mr. Neblett: That is objected to, your Honor. She doesn't know, apparently.

Mr. Jones: The best we can do in a case like this is to show what the probabilities were.

The Court: I will overrule it."

(Witness continuing):

From the perforations on the check, it appears that it cleared on the 2nd of January. Taking into

(Testimony of Ruth Boucher Howell.)

consideration the practice in our department to which I have testified, and the fact of the perforations indicating when it was cleared, the check appears to have been received in the bank on the second of January.

Thereupon, the check was offered and received in evidence without objection and marked Petitioner's Exhibit No. 1. Leave to substitute a photostatic copy was granted. (A photostatic copy is attached hereto and made a part hereof.)

Cross Examination

(By Mr. Neblett):

Our bank's perforations on Petitioner's Exhibit No. 1, which show the figures, 1-2-35 (which is January 2, 1935), indicate to me that the check was received and cashed on January 2, 1935. The check endorsed "Yakima National Bank, Executor, Estate of A. E. Larson, deceased," was no doubt received by Mr. Hoffman and given to me at that particular time to supply this typewritten [69] endorsement. He would then sign it after I had supplied the typewritten endorsement. I would say that I supplied the typewritten endorsement on this check on the second of January, 1935. I base that purely from the fact that we completed each day's business as it came about.

The Surety Finance Company is in Yakima, Washington; it is about a block and a half from the Yakima National Bank. I would not say it was

(Testimony of Ruth Boucher Howell.)

likely that this check could have gotten in and been cashed on December 31, 1934, unless it had been delivered in person and apparently it was not, because it was a dividend check and dated the 31st day of December. It was mailed on that day and not received by us until the second of January. There is nothing on the check to indicate it was mailed or delivered in person.

Thereupon, there was offered in evidence as Petitioner's Exhibit No. 2 a resolution of the Surety Finance Company under which is shown the dividend check, which was received without objection and made a part of the record. (A photostatic copy of said exhibit is attached hereto and made a part hereof.) (Counsel for taxpayer consented to have a witness for the Commissioner heard out of order.)

Thereupon,

ROBERT M. HARDY,

a witness on behalf of the Commissioner, was sworn and testified as follows:

Direct Examination

(By Mr. Neblett):

I was president of the Sunshine Mining Company in the latter part of 1934. I became president after Mr. Larson's death; he died on Thursday, June 7, 1934, and I was elected on June 11, 1934. I was

(Testimony of Robert M. Hardy.)

connected with the Estate of A. E. Larson, Deceased, in the year 1934 by being president of the Yakima First National Bank which was executor of his estate. [70]

I know Rose B. Larson, the petitioner (taxpayer) herein. She was the residuary legatee and surviving spouse of A. E. Larson, deceased.

During the lifetime of Mr. and Mrs. Larson, I was what you would call a rather close business friend of Mr. Larson. He was the first vice president of our bank and he was on the Board. He was on the Board of the Guaranty Trust Company, the same as I was. He was on our executive committee, and he was on the executive committee and the board of a holding corporation. I was president of the holding corporation and the bank, and vice president of the Guaranty Trust Company. I was mentioned in Mr. Larson's will as one of his beneficiaries. [71]

I know of a plan which had as its purpose the listing of the Sunshine Mining Company stock on the New York Stock Exchange.

This plan had been talked of prior to Mr. Larson's death. All I know about the plan before Mr. Larson's death is what I was told by Mr. Larson and some of the other directors. I had no direct contact with it at all. Mr. Larson talked to me about it a number of times.

"Mr. Jones: I will object to that as hearsay.

(Testimony of Robert M. Hardy.)

The Court: He hasn't said what he knew, though; so there is nothing in the record.

* * * * *

A. It was pretty close to Mr. Larson's death, either on the day or the day after that, Mr. Stolle first came into the bank. Some ten days later, I should say, after I had become president of the Sunshine Mining Company and the bank had qualified as the executor of the Estate, he came in to talk to me about a plan about listing the stock on the New York Stock Exchange. At that time I told Mr. Stolle that I had only been president of the company for a very short time. I hadn't had a chance to get my feet on the ground and couldn't talk to him intelligently. Two days later, Mr. Alexander Miller, vice president, and who assumed the presidency after Mr. Larson's death and resigned and I became president, came in with Mr. Stolle and said to me that Mr. Stolle had said to him I wouldn't talk to him about the listing plan and I said that is true; and he said 'I think, Mr. Hardy, we should talk to him', and I said, 'All right, Mr. Miller, if you feel that way about it we will talk to him.'

We spent probably intervals of a day and a half talking to Mr. Stolle. I finally suggested to Mr. Miller that I thought Mr. Cox, who was a stockholder and a director, should be in on these conferences, too. I called him up. I know it was along late in the afternoon for he drove from about three

(Testimony of Robert M. Hardy.)

o'clock to get to Yakima that night. The three of us met with Mr. Stolle that day."

(Witness continuing):

Mr. Miller was the second largest stockholder of the company; and Mr. Cox was one of the largest stockholders.

After Mr. Cox, Mr. Miller, Mr. Stolle and I worked this thing over, for, oh, [72] another day—we agreed that we would go ahead, Mr. Stolle requiring that the largest stockholders option to him approximately 40% of the stock. There were two very good reasons advanced why this stock should be listed on the New York Curb Exchange. One was that it would enlarge the market. The Spokane market, where it was listed, if you put 1,000 shares for sale up there it would take them two or three days to sell it. If you put more, you might break the market. So it enlarged the market and thereby you had a pretty fair chance of enhancing the value.

It was generally discussed that it would enhance the value; that is, it was our opinion that it would enhance the value, if the stock was listed on the New York Curb Exchange. I know whether there were any expenses connected with the plans for listing the stock on the New York Curb Exchange. Mr. Stolle, as far as the expenses we had at Yakima, paid us himself.

70,000 shares of the Larson Estate were optioned to Seligman and Company. [73]

(Testimony of Robert M. Hardy.)

As a result of these option transactions with the large stockholders of Sunshine Mining Company, Seligman just got the options for putting up this expense money. I do not know how many options Seligman and Company got through Mr. Stolle.

At the meeting of these large stockholders, namely, the Larson Estate, Mr. Miller, Mr. Cox, and Mr. Hull, it was generally stated that about 40% of the entire holdings would be required to meet Mr. Seligman's demands.

The Larson Estate owned approximately 210,900 and some odd shares. I discussed with Mr. Stolle the question of options on the shares held by the Larson Estate.

“Q. (By Mr. Neblett) When did this conference take place and what was said at this conference between you and Mr. Stolle?

Mr. Jones: I make this further objection that this is in no wise binding upon the petitioner here.

The Court: If it doesn't appear to be it will not be considered. Go ahead.”

(Witness continuing):

It was during the time of our conference with Mr. Miller and Mr. Cox and Mr. Stolle and myself that those options on the Estate's shares were considered and talked about. [74]

(Witness continuing):

It is true that at these conferences, the other large stockholders agreed to similar options of their

(Testimony of Robert M. Hardy.)

stock. I would have to say that there was always a proviso with what I said to Mr. Stolle—two provisos, in fact; first, that the court approve it, and second, that Mrs. Larson approve it.

“Q. (By Mr. Neblett) Now, do you know whether or not Mrs. Larson approved it, and the court did approve the sale by the bank, or the executor of the estate?

A. I think I can't answer that question with a 'yes' or 'no'.

Q. You can't answer that question?

A. I can't answer the question 'yes' or 'no'.

The Court: What did happen?

The Witness: You want me to tell you the story?

The Court: Yes.

The Witness: I went up to see Mrs. Larson and explained the whole thing to her. I had the options with me. She said, 'Mr. Hardy, I am not very well. I wish you would take that up with Shirley and whatever you two decide will be all right.' ”

(Witness continuing):

I took the matter up with Shirley and had a conference with him about it. Grover Burrows, a partner of A. E. Larson in the automobile business, was also at the conference, because he was a close friend of Mr. Larson before his death. I suggested that he be present at the conference. Mr. Parker, Mr. Burrows and I discussed this matter for practically an afternoon. There was one legal point in the thing

(Testimony of Robert M. Hardy.)

that I could not answer, so we agreed to meet at Mr. Nat Brown's office, the attorney for the estate, the next morning and have him explain it to us. After that explanation was made, Mr. Parker agreed to it.

The stock pledged by Miller, Cox, Mrs. Hull, and Larson Estate was all Seligman and Company required for listing on the Curb Exchange—all they required was the largest stockholders and directors. All four had to option [75] or it was just no deal. All four did option the stock. The agreements with respect to optioning the stock was put in writing. Besides the 70,000 shares optioned by the Larson Estate, there were 10,000 shares, at first, agreed to be sold outright under what they called a sales agreement; that is, so much to be paid down and finally it was taken up at a price. The 10,000 shares were later increased to 15,000 shares. That made a total of 85,000 shares optioned and sold.

There was a sales agreement made in respect to the 10,000 shares. I don't believe there was any on the extra 5,000 shares. I think that was taken up immediately.

Thereupon, counsel for the Commissioner offered and there was received in evidence without objection five option contracts, all dated June 30, 1934, together with an escrow agreement attached to each, which were marked Respondent's Exhibit A and made a part of the record. (A photostatic copy of each of the documents contained in Respondent's

(Testimony of Robert M. Hardy.)

Exhibit A is attached hereto and made a part hereof.)

Mr. Neblett: The escrow agreements are dated June 30, 1934, and executed by the Yakima First National Bank, by E. P. Hoffman.

“Mr. Neblett: He is trust officer, as the duly appointed and acting executor of the estate of A. E. Larson, Deceased.

The Court: Very well.

Mr. Neblett: And the option agreement is entitled ‘Option agreement by Grande-Stolle and Company, a Washington corporation, to the Yakima First National Bank, a corporation, as a duly qualified executor of the Estate of A. E. Larson, Deceased, receipt of which is acknowledged, does hereby grant to Grande-Stolle and Company, a corporation, the right to purchase 10,000 shares of the capital stock of the Sunshine Mining Company, in the sum of \$7.00 per share.’

The Court: Yes. Well, just give a description as to the parties executing the agreement. [76]

Mr. Neblett: That one is signed and dated, ‘June 30, 1934, Yakima First National Bank, by E. P. Hoffman, trust officer of the estate of A. E. Larson, Deceased, by Carl M. Stolle, V. P.’

Now all of the other four options, your Honor, are similar in language to the one I have just mentioned.

The Court: All right.”

(Testimony of Robert M. Hardy.)

(Witness continuing):

I am familiar with the provision of the options on the last bottom page which states: "It is understood that during the life of this said option the undersigned agrees that it will not sell or dispose of any of its stock now held on the * * * not to exceed 1,000 shares of its said stock, provided that said Grande-Stolle and Company, a corporation, shall have first right of refusing the stock."

I don't remember how many different agreements there were. The sale of the 70,000 were limited by a similar restriction.

"Mr. Neblett: If your Honor please, if you think it necessary, I can tell you what certificates were mentioned in each option.

The Court: Well, I will read that, if it is just for my information.

Mr. Neblett: I think there is sufficient to identify it now.

The Court: Yes, all right.

Mr. Jones: Well, Mr. Neblett, it is only a matter of identification. I have admitted the deficiency attached is the basis. We are not disputing that.

Q. (By Mr. Neblett) Mr. Hardy, do you know whether or not these certificates actually mentioned in the option agreements were the certificates that were later sold?

Mr. Jones: I am not disputing that, your Honor. They tie in with the exhibit.

The Court: All right.

(Testimony of Robert M. Hardy.)

Q. (By Mr. Neblett) Mr. Hardy, do you know whether or not the Court knew about the plan to list the Sunshine Stock on the New York Curb Exchange at the time the order approving the options was made?

Mr. Jones: May I ask the purpose of that question,—is it to impeach the order of the Court? [77]

Mr. Neblett: I just wanted to know——

The Court: As to whether the Court approved the plan for listing?

Mr. Neblett: Yes.

The Court: And the option agreements and so forth, looking to that end?

Mr. Neblett: Yes, that is all.

The Court: I will overrule the objection."

(Witness continuing):

The Court knew about the general plan for listing. We petitioned the Court to give us an order that we could enter into a sale or option agreements for the sale of the stock to Grande-Stolle and Company. We figured we were selling 40% of the total stock. As to the legal end as to whose it was, or what not, that was up to our attorneys. We figured we were selling 40% of the 210,974 shares. We knew about the petition to sell personal property which covers the sale and option of this stock and the Court's order authorizing sale of personal property.

Thereupon, there was offered and received in evidence without objection a copy of a document re-

(Testimony of Robert M. Hardy.)

ferred to as "petition to sell personal property in the matter of A. E. Larson, Deceased, No. 8561," which was marked Respondent's Exhibit B and made a part of the record.

Thereupon, there was offered and received in evidence without objection a copy of a document referred to as "Order authorizing sale of personal property, dated July 26, 1934, and signed by R. B. Milroy, Court Commissioner, in the matter of A. E. Larson, Deceased, No. 8501," which was marked Respondent's Exhibit C and made a part of the record.

(A photostatic copy of each of Respondent's Exhibit B and C is attached hereto and made a part hereof.)

(Witness continuing):

I understood that the Court before entering its order (Resp. Ex. B) fully understood the plan of listing the stock on the New York Curb Exchange and the [78] options entered into pursuant to that plan, because we so explained it to the Judge and that he approved the sale and option of this stock.

"The Court: Well, this order of sale here,—what is this,—an order confirming sale or approving sale, or what is it?

Mr. Neblett: It is an order authorizing the sale of personal property, and reads as follows: 'Dated the 26th day of July, 1934, R. B. Milroy, Court Commissioner'.

(Testimony of Robert M. Hardy.)

The Court: Well, that ratifies all the acts heretofore done and in connection therewith. Now, if you haven't shown what acts were done, you might show that.

Q. (Mr. Neblett) What acts had you performed, Mr. Hardy, relative to,—

A. (Interposing) Well, what we had done was to confer with Mr. Miller and Mr. Cox and agree with them that we would sell, if they would sell.

Q. And was the 40% mentioned?

A. Well it happened to work out around 40%.

Q. Yes.

A. Some sold a little bit more, and some a little bit less.

Q. Yes.

A. The Larson estate actually sold a little bit less than 40%.

Q. Yes.

A. Until that 5,000 additional was added.

Q. Why?

A. In the first order, it was a little less.

Q. Yes.

A. I don't remember the amount that Mr. Stolle said that he had to have from the stockholders, but you can work it out. It happened to work out close to 40%.

Q. That each of the larger stockholders sold?

A. Yes.

Mr. Neblett: That is all." [79]

(Testimony of Robert M. Hardy.)

Cross Examination

(By Mr. Jones):

The trust officer in the bank handled all the details of the Larson Estate. I handled all the things that you might call matters of policy or any larger problems. In the negotiation with Mr. Stolle, I was acting in the capacity of president of the executor bank. I was not acting in any sense as president of the Sunshine Mining Company. I had no personal stockholdings in the Sunshine Mining Company at that time, but Mr. Miller had placed a thousand shares in my name so that I could qualify as a director, and I did from time to time purchase some stock. I had some in contemplation. Within 90 days after Mr. Larson's death, I had acquired 4500 shares. I paid higher prices than these option agreements represent. It is true, later on, that the more I could make the stock worth, the better off I was. Grande-Stolle and Company fixed a certain amount of stock that they wanted to get tied up by a number of shares from the largest stockholders—it happened to work out 40%. They fixed some certain specific number of shares. Not all the stockholders of Sunshine Mining Company optioned stock to them.

I don't know how many shares Mr. Miller optioned to them. Mrs. Miller optioned to them; she optioned, I think, 50%. The Hull family had some stock; they all optioned portion of the stock they held. It really was the four directors in the imme-

(Testimony of Robert M. Hardy.)

diate family holdings,—Cox, Miller, Hull and Larson—they wanted to tie up. Mr. Stolle wanted a certain aggregate number of shares out of those four holdings. In the case of the Larson interests, it amounted to about 85,000 shares.

“Q. Now, he didn’t care whether it came out of Mr. Larson’s half or Mrs. Larson’s half, did he?

Mr. Neblett: That is objected to.

The Court: Overruled.

A. I don’t think he cared where it came from.”

[80]

(Witness continuing.)

He did not say anything to me to indicate that he was wanting to tie up Mr. Larson’s shares as distinguished from Mrs. Larson’s shares.

“Q. Did you ever discuss with Mrs. Larson that she was tying up her shares as distinguished from the Estate shares?

A. I discussed with her that the whole amount was being tied up, yes, sir.

Q. That is, the whole 75,000 or 80,000 shares?

A. Yes, sir.

Q. Did you ever discuss with her that it was distinguishable,—her shares from the Estate shares?

A. No, sir.

Q. Did you ever discuss that with Mr. Parker,

A. No, sir.

Q. Now, this provision that counsel calls your attention to about not making any sales of over 1,000 shares until the option ran out which I think was at the end of ’34,—that was just, you say, to tie the holdings up for that period?

(Testimony of Robert M. Hardy.)

A. Yes, sir.

Q. Now, as a matter of fact, didn't you know that the fact that the stock was in the estate necessarily tied it up until after the end of 1934, didn't it?

A. I didn't think so.

Q. Well, you knew that the six months' period on filing claims and before distribution could be made wouldn't run out until the end of the year, did you?

A. But I at all times thought we could get an order of Court and sell some of the stock.

Q. Yes, under an order of court? A. Yes.

Q. But unless you got an order of court to sell it, none of that stock was going to be free for sale by any beneficiary during that year, was it?

A. That was true."

(Witness continuing):

When we petitioned the Court to sell this stock, the petition was read by Mr. Brown in his office to Mr. Parker, Mr. Burrows, and myself before the order was signed.

The purpose of selling that stock, as far as the Larson Estate was concerned, was to pay debts of the estate and to pay bequests. The estate had to pay around \$100,000 of debts. [81]

"Q. Didn't the Estate have considerably more than enough to pay those debts without having to sell any of that Sunshine Mining Company stock?

A. I wouldn't say 'yes' to that, Mr. Jones. That

(Testimony of Robert M. Hardy.)

was about—Mr. Larson had a lot of property and buildings, but that was about the most salable thing that he had, Sunshine stock; in fact, the only real salable thing.”

(Witness continuing):

Sunshine Mining Company at that time was on a 16¢ dividend basis; it made one 16¢ dividend. I am a little hazy as to what they paid the first quarter of 1934; but the second quarter, they paid 16¢, and my memory is that that was the first time they paid 16¢. From that time on, they continued paying 16¢ a quarter. The estate had from that source \$30,000 or \$35,000 a quarter in dividends. The Larson Building at that time was running at a loss, but the estate received a regular income from it. I don't remember how much. The Donnelly Hotel brought in around \$1,500 or \$1,600 a month.

At the time the application for sale was made, I understood that the petition for the sale of the Sunshine Stock recited: “That it is necessary that some part of the personal property of said estate be sold to pay the specific bequests provided in the will herein, and that your petitioner believes that said offer of the Grande, Stolle & Company is the best offer that could be received for a portion of said stock in the Sunshine Mining Company.”

Really the purpose of selling the stock was to clean up everything and close the estate, including whatever debts and——. I remember testifying in

(Testimony of Robert M. Hardy.)

a suit entitled "In the matter of the Estate of A. E. Larson, deceased, and also Shirley D. Parker, as administrator de bonis non with the will annexed of the estate of A. E. Larson, deceased, Plaintiff, vs. R. M. Hardy, et al., Defendants" that was brought in the Court of Yakima County.

"Q. Do you remember testifying this way:

'Q. Were these options for the purpose of listing this stock on the New York Stock Exchange?

'A. Well, in the case of Yakima First National Bank, the option on that stock, the purpose of doing that was that we were faced with having to pay about one-half a million dollars in bequests.'

Did you so testify?

A. Well, it has been about two years ago, but I think I did. [82]

Q. That is correct, is it?

A. That is correct.

'Q. Then it was by virtue of the Larson Estate that you reached out and got that?

'A. I say, so far as we were concerned, that was the motive in our options.'

Did you so testify?

A. I would think so, yes, sir.

Q. When you said that was the motive in our optioning, were you referring to the previous an-

(Testimony of Robert M. Hardy.)

swer that you wanted to have the funds on hand to pay about a half a million dollars in bequests?

A. Yes."

(Witness continuing):

And that was about the amount of bequests that I anticipated. Mr. Larson made bequests of slightly under \$500,000. I contemplated at that time that all of those bequests would have to be paid. At the time we optioned this stock, we anticipated the payment of the bequests in full. We did not even consider or discuss specifically as far as any legal description went in the matter of whose stock was being sold,—whether it was Mrs. Larson's stock or any interest she had, or Mr. Larson's interest. I think that was gone into specifically by the attorney for the Estate, Mr. Brown of Rigg, Brown & Halvorsen.

It was a supposition on my part when I testified on Direct Examination: That in tying up a certain number of shares, if we got 80,000 or 85,000 shares out of the Larson interests, that was all Mr. Stolle wanted and it didn't make any difference to him whether it came out of Mr. Larson's share or Mrs. Larson's share. That was my understanding. [83]

Redirect Examination

(By Mr. Neblett):

When I stated I had some discussions with Mrs. Larson in which she understood that the whole amount of the Larson stock was being tied up, I had

(Testimony of Robert M. Hardy.)

in mind when I said "the whole amount of Larson stock" the 210,900 shares, which were being tied up, so that we couldn't sell them for four months; we were actually optioning and selling 80,000 shares.

Thereupon, there was offered and received in evidence without objection a copy of the last will and testament of A. E. Larson, which was marked Respondent's Exhibit D.

(A photostatic copy is attached hereto and made a part hereof.)

(Witness continuing):

I have seen this will. I was familiar, after Mr. Larson's death, with paragraph 17 of the will which states: "The executor of my estate shall have three years if necessary to liquidate enough property to pay all of the above bequests."

Thereupon,

NAT U. BROWN,

a witness on behalf of the taxpayer, was duly sworn and testified as follows:

Direct Examination

(By Mr. Jones):

I am an attorney-at-law and practice at Yakima, Washington. I have been there 18 years. My firm name is Rigg, Brown and Halvorsen. My firm was an attorney for the executor for the Larson Estate.

(Testimony of Nat U. Brown.)

I personally handled most of the legal matters connected with the Larson Estate.

Thereupon, there was offered and received in evidence without objection a document referred to as a petition and order bearing date of July 31, 1934, in which the authorization to sell 10,000 shares of Sunshine Mining Company stock [84] was increased to 15,000 shares, which document was marked "Petitioner's Exhibit 3" (Petition) and "Petitioner's Exhibit 4" (Order).

Thereupon, there was offered and received in evidence without objection a petition of the Larson Estate verified May 1, 1935, for partial distribution, and an order dated May 1, 1935, which were marked "Petitioner's Exhibit 5" and "Petitioner's Exhibit 6", respectively. (Photostatic copies of Petitioner's Exhibits 3, 4, 5 and 6 are attached hereto and made a part hereof.)

I prepared and presented the petition of July 26, 1934, for the sale of 10,000 shares and the option of 70,000 shares of Sunshine Mining Company (Respondent's Exhibits B and C, respectively), followed by the petition of July 31, 1934 and the order of the same date increasing that from authority to sell 10,000 to 15,000 (Petitioner's Exhibits 3 and 4, respectively).

I prepared the first petition and order at the request of Mr. Hardy and the bank; and the second petition and order were prepared at the request of

(Testimony of Nat U. Brown.)

Mr. Parker, who was working for the bank then, and Mr. Stolle.

There was no consideration given in connection with those applications to the matter of whose stock was being sold as between Mrs. Larson's interest and the Estate's interest. I had no discussion with Mrs. Larson that any part of her interests were being sold. I had no discussion with Mr. Parker to any such effect.

I understood the purpose and justification for selling the stock was to pay the specific bequests. That is the recitation in the petition and that language was advisely used.

The purpose of selling it, was to pay specific bequests—that is what I had in mind. I dictated the language of the petition. I presented the matter [85] to the Court Commissioner, and got the order.

In presenting a petition, our Court Commissioner requires you to prove your petition. You just take it and prove each paragraph or offer evidence on each paragraph of the petition. Evidence was offered on the paragraph of the petition which recites that it was for the purpose of paying the legacies of the decedent. This was prior to the inventory of the Estate. There had been no inventory filed yet; and, of course, there had been no appraisal of any part of the Estate yet. The Estate was known to be solvent. I don't know how much the claims amounted to; I know they were in the

(Testimony of Nat U. Brown.)

neighborhood of \$100,000. We figured the value of the Estate at about a million and a half.

“Q. Did you subsequently file a petition and get an order which made any segregation or application of the stock that was sold as between Mrs. Larson’s interest and the Estate?

A. This is from memory. Sometime later,—I don’t know how long after that,—Mrs. Larson wanted some stock to give to her son, as I recall it.

I presented the petition asking for the distribution to her of either 10,000 or 15,000 shares of her remaining 105,000 shares that belonged to her in the estate.”

(Witness continuing):

Petitioner’s Exhibits 5 and 6 are relative to the transaction just described; the petition is for the distribution to her as residuary legatee. I say that they have bearing on the allocation of the stock that was sold because “at the final report of your petitioner’s executor herein on file and such final report, together with the inventory shows that included within the estate herein was the total of 210,974 shares of capital stock of the Sunshine Mining Company, a corporation, of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, the bank and petitioner, shares to the number of 125,974, of which said shares Rose B. Larson [86] as surviving spouse is the owner of 105,487. That was on the first day of May, 1935.”

(Testimony of Nat U. Brown.)

The petition was drawn in that language on the basis of the community property she was entitled to have distributed to her one-half of these shares of stock, or 105,000 as set out. (Motion to strike the last statement as being a conclusion was overruled.)

At the time these petitions were being presented, I considered what right, if any, it (the executor) had to sell the property of the estate. I am sure that I advised our clients as to that point in connection with presenting these petitions.

I don't recall what our conclusion and advice were as to the extent to which they might sell the property of the estate—whether for the payment of legacies or debts, or whatnot. Each specific thing was gone into. Mr. Larson's one-half of the estate could be sold to pay the specific bequests, and that the whole community estate, if necessary, could be sold to pay the debts and the cost of administration. There was no change in the five days between July 26 and July 31, in the needs of the Estate to pay debts that had any effect, or caused the increase in the sale from 10,000 to 15,000 shares.

The reasons for the second sale were not any different from the reasons for the first sale, except that Mr. Stolle's principals wanted to buy outright 5,000 shares more than they did the few days before,—that was all. I was just generally familiar with the income and current assets of the Larson Estate. I did not handle any of that, but just generally. You see, this was not a non-intervention will, so we had

(Testimony of Nat U. Brown.)

to handle the leases and get orders on practically everything that was done.

No consideration was given as to any necessity of selling any of the assets of the Estate to pay debts.

[87]

“Q. In obtaining this order for the sale of stock, did you have any intent as to what stock was being sold, as to whether it was,—affected Mrs. Larson’s interests as distinguished from the interests of the decedent?

Mr. Neblett: I object to that, Your Honor.

The Court: I will sustain that objection unless it is communicated to the parties instant.

Mr. Jones: The respondent in his notice of deficiency here has said that he is assessed a deficiency, and because the sale was made by reason of the orders,—I think that was the language,—show that Mrs. Larson agreed through Mr. Parker to the sale of her interest in the stock. Now, Mr. Brown was acting on behalf of the executors of the estate and it seems to me that this question gets down pretty much to a matter of intent.

The Mildred Hubbard case which arose in this jurisdiction and was decided by the Board,—I think in the 30 B. T. A., presented a similar question except that it was a non-intervention will. They had a lot of stock in the Boeing Airplane Company and during the administration, the executrix who was the widow, sold a lot of the stock. She showed in the proceeding that she intended to sell the estate’s in-

(Testimony of Nat U. Brown.)

terest, and not her own. It seems to me that the matter of the intent of the person that handled it, particularly as here, it was shown as Mrs. Larson said, 'I will leave that to Shirley,' and Shirley was working for the executor.

It seems to me that this is pertinent.

The Court: If I follow you correctly, in your citation of the case in question, it seems to me that the executor would be the one to entertain the intent. I don't know;—of course, I realize the fact that the executor was a corporation, some human being has to act for it.

Mr. Jones: Yes; the executor is a corporation. Mr. Hardy said they were simply tying up this stock, and he left that to Mr. Brown. That was his testimony just a few minutes ago. It seems to me that this is a material and suggestive thing. It ties in, as I say, with the Hubbard case. The matter of intent is a material element in a case of this kind.

Mr. Neblett: I would like to state on that point that this intent,—these decrees—don't mention any intent at all.

Now, if Mr. Brown had had that intent, it seems to me that that intent would have been expressed in that decree.

Now, he is here by oral testimony trying to vary the terms of a decree and petition that he drew, stating what his intent was. Now, it is probable, and the chances are that if he had had that intent,

(Testimony of Nat U. Brown.)

and they were selling the Estate's interest only, that that statement would have been made in the Petition itself, and the Court order would have confirmed it. [88]

The Court: Well, it strikes me that the question here is whether this witness could exercise intent on behalf of the executor. The executor is the one that must have intent, as I understand your Hubbard case. The executor, of course, was the bank, and I assume that the representatives of the Bank,—that is, the proper officials of the bank,—would perhaps have to exercise the intent on behalf of the executor. Whether the attorney for the executor could do that, or not, is the question in my mind.

Mr. Jones: Under the testimony here, as I say, that Mr. Hardy said Mr. Hoffman handled the details and he, Mr. Hardy, didn't consider the matter as to whose stock was being sold; he didn't pay any attention to that.

I do think the basis upon which Mr. Brown submitted the matter is material. After all, I think in order to bind Mrs. Larson both in the tax case and in the probate matter, you would have to show that she intended that her interest in the stock should be sold; and I want to disprove that. I appreciate that it is getting close to the question of a line, but I submit—

The Court: (Continuing) What difference would it make if the executor had the intent or not, if he had no right to sell it?

(Testimony of Nat U. Brown.)

Mr. Jones: Well, the main reason that I put it in there was because of this statement in respondent's 90-day letter:

'It is further noted that you contend the stock sold was singled out from one-half of the estate for the payment of bequests. The records indicate the Court considered this to be a sale of community property, and your approval through the agent was obtained before the sale was authorized.'

Now, if Mr. Brown in submitting this matter didn't intend to get any authority to sell the stock of Mrs. Larson, obviously that statement is not supported.

The Court: I think you had better confine it to what was actually done, and what was presented to the Court.

I don't believe that this witness as attorney for the executor could really advise anybody by his intent unless that intent was expressed in this matter presented to the Court, and probably in such a way as to bind Mrs. Larson,—rather, unless she had agreed to it, or it was understood by her and she understood her rights, or what was being done with reference to the community property, if anything.

Mr. Neblett: Right on that point, Mr. Hardy has testified over and over again,—he is the one (indicating witness) if the intent is admissible, to be the one to testify concerning it. He has testified

(Testimony of Nat U. Brown.)

that 40% of the shares were being sold. That simply means broken down to plain language that the intent was to sell the community stock, as I see it.

Now, this witness certainly cannot take the stand and testify to a contrary intent. I mean the attorney. He is supposed to carry out the intent of his [89] client, and not a contrary intent.

Now, the evidence shows that the balance of the stock was tied up. It shows that the whole community estate was involved in the transaction.

The Court: Well, I believe that I will reconsider that ruling and overrule the objection and let it go in.

Q. (Mr. Jones, continuing) I will ask you, Mr. Brown, what was your,—if you had any intent in submitting these petitions and orders?

A. Yes.

Q. As to whose stock was being sold?

A. Yes.

Q. What was that intent?

A. To sell Mr. Larson's stock. I felt that we didn't have any right to sell Mrs. Larson's half of the community to pay these bequests. As a matter of fact, I discussed that with Mr. Parker at some time or other in connection with this because I advised him that there would be 105,000 shares left to be distributed to his mother even though all of the stock was sold."

(Testimony of Nat U. Brown.)

(Witness continuing):

We did not consider whether there was any necessity of selling the stock, or any other assets to pay debts of the estate. I didn't feel that there was any necessity of selling any other property to pay debts. I don't think the question as to the necessity of making any sale of assets of the estate to pay its debts was discussed or talked over. There were two things,—the big things were the legacies and the estate tax. So far as I know, Mrs. Larson did not exercise any control or direction over the business matters of the estate.

I prepared the final account of the executors and followed that by a supplemental account.

Thereupon, there was offered and received in evidence without objection the inventory and appraisal of the estate, which was marked Petitioner's Exhibit No. 7.

There was also offered and received in evidence without objection the final report of the executor in the petition for distribution, containing report of operating expenses and of all the assets except details as to the Larson Building, which [90] was marked Petitioner's Exhibit No. 8.

There was also offered and received in evidence without objection a copy of the supplemental report, which was marked Petitioner's Exhibit No. 9.

(Photostatic copies of Petitioner's Exhibits, Nos. 7, 8, and 9, are attached hereto and made a part hereof.)

(Testimony of Nat U. Brown.)

(Witness continuing):

I didn't prepare the financial statement. Mr. Hoffman prepared that, but I prepared the legal part, submitting it. The compilation and the lists and disbursements were handed to me by Mr. Hoffman, and attached as a part of the exhibit.

"Mr. Jones: Petitioners' Exhibits 8 and 9 with reference to the facts set out and the date of the proceedings.

Mr. Neblett: We accept your statement as being true.

Mr. Jones: Does the same thing apply to the details of the financial transaction set out as Exhibits 3 and 4?

Mr. Neblett: In so far as we know, they are all right. We will ask that they go subject to check.

Mr. Jones: Unless you advise to the contrary, then, it may be assumed that the recitals contained in those reports are true and correct?

Mr. Neblett: Yes.

Mr. Jones: All right. That is all.

The Court: Cross examine." [91]

Cross Examination

(By Mr. Neblett):

I acted upon the instructions of Mr. Hardy and Mr. Parker in drawing the petition for distribution I submitted to the Court in the Larson Estate. Mr. Hardy and Mr. Parker were both there at the time the information was given to me. Mr. Parker is

(Testimony of Nat U. Brown.)

Mrs. Larson's son, who is the step-son of Mr. Larson and who was employed by the bank shortly after its qualification to assist in the administration of this estate. I understood Mr. Parker was representing his mother, Rose B. Larson.

We felt that we ought to consult her because she was the residuary legatee. Apparently, both she and Mr. Parker were anxious that the estate's administration should be closed as soon as possible, don't you see; so that is it. He was consulted very often in connection with that.

We had conferences in connection with these petitions with both Mr. Hardy and Mr. Parker. I knew at the time of the attempt to list the Sunshine Mining Company stock on the New York Curb Exchange, well, along in June, just at the time Mr. Stolle, after Mr. Hardy had been elected president of the mine and qualified; it was along about June 23 or 24 when I first heard. We drew the option agreements in respect to the stock of the estate. We knew those agreements contained the limitation on all of the stock of the community estate. After Mr. Larson was deceased on June 17, 1934, I had occasion to read the will. We knew of the provision in Mr. Larson's will in paragraph 17, which provided: "The executor of my estate shall have three years if necessary to liquidate enough profits to pay all of the above bequests", and we discussed that very often and at various times. [92]

(Testimony of Nat U. Brown.)

(By Mr. Neblett):

“Q. In other words, Mr. Brown, as far as the bequests were concerned, you didn’t have to sell the stock at all, is that right, under the will?

A. I don’t think that is right.

Q. Well, the will says you had three years to sell the stock or to pay the bequests?

A. If we hadn’t optioned this stock, we never would have gotten over \$2.00 a share for it.

Q. Exactly. In other words, in listing the stock on the New York Exchange, the stock retained enhanced in value to the stockholders?

A. Not only that, but the stock that was sold was sold for a great deal more than it could have been sold for in any other way. One half of the stock, unless it had then been sold, would not have paid the bequests. We would even have had to get into the real estate to do it.”

Thereupon,

FRANK H. CHURCH,

a witness for the taxpayer was sworn and testified as follows:

Direct Examination

(By Mr. Jones):

I am a Public Accountant, and carry on my business at Yakima, Washington. I have handled most of the accounting work and income tax work of the

(Testimony of Frank H. Church.)

Larson Estate and Rose B. Larson (petitioners here), since early in the year 1935. I prepared the 1934 returns. Mrs. Larson was on the cash basis. I also prepared the return for the A. E. Larson Estate. For the period June 8, 1934, after Mr. Larson's death, to December 31, 1934, efforts were made to include all of the income and by an inadvertence, all of the income applicable to the community estate as well as income and expenses were included in the one return. The income tax return shows a net income for the Estate for the period June 8, 1934 to December 31, 1934 of \$54,693.09. [93]

Thereupon, there was offered in evidence the original notice of deficiency (90-day letter) from the Commissioner of Internal Revenue, dated May 16, 1940, addressed to the Estate of A. E. Larson, proposing a deficiency of \$143,000-odd, which was marked Petitioner's Exhibit No. 10. (A photostatic copy is attached hereto and made a part hereof.)

(It was thereupon stipulated that an appeal has been taken from the notice of deficiency (Pet. Ex. 10), and that the Docket Number of that appeal is 104214.)

(Witness continuing):

In the return for the Estate of A. E. Larson for the period from June 7, 1934 to December 31, 1934, I included interest received from community property obligations. The Item "B" in the petition of interest of \$2,374.68 represents half of the interest

(Testimony of Frank H. Church.)

that was included in the return for the Estate for that period. Item "C" in the petition of rentals of \$9,782.49 represents half of the rentals from the community property, the total of which was included in the Estate return for the period June 7, 1934 to December 31, 1934; although some adjustments have been made which are not now in question.

"Q. (Mr. Jones continuing): Now, referring to item 'E', dividends of \$33,453.64, I will ask you whether those dividends were included by you in the dividends reported by you for the Estate in its income tax return for that period?

A. I think the amount that you referred to includes \$1,570 or \$1,800 in addition to one-half of the community.

Q. Well, it includes an adjustment, does it not?

A. Yes.

Q. For one-half of \$3,600, Surety Finance dividends? A. That is right.

Q. And one-half of \$3,140 Surety Finance?

A. That is right. [94]

Q. But that is one-half of the community property included in the Estate's return, is that right?

A. That is right.

Mr. Jones: That is correct, Mr. Neblett?

Mr. Neblett: That is correct, except that we have an alternative issue on that, Mr. Jones.

Mr. Jones: Yes, I know you have. I know that you have asserted that.

(Testimony of Frank H. Church.)

Mr. Neblett: Yes. The figure of \$1,570 down there. As I understand it, Mr. Jones,—take your assignments of error, 'E' and 'H', they are combined together.

Mr. Jones: Yes.

Mr. Neblett: Which totals up \$35,023.64, isn't that right?

Mr. Jones: Well, I can't tell you exactly the figures, but they do enter into the same computation.

Mr. Neblett: Exactly. That is 'E' and 'H' in the amended petition.

Mr. Jones: I have no doubt that we can adjust all of those under Rule 50, but I wanted the record to show.

Mr. Neblett: Let the record show that we are referring to Paragraph 5 E and H of the amended petition.

That is right, is it not?

Mr. Jones: Yes, we are referring to paragraphs E and H of 5 of the amended petition.

Q. (Mr. Jones, continuing) Now, this \$1,570 that is included in Item H, dividends on Surety Finance Company, did you include that in the Petitioners' return for the period from January 1 to June 7? A. I included one-half of the \$3,140.

Q. Just a minute. She made a return for the full year.

You included the one-half of the \$3,140 dividends on Surety Finance Company stock accrued to the date of Mr. Larson's death in the income tax return of the petitioner, Mrs. Rose B. Larson, didn't you?

(Testimony of Frank H. Church.)

A. Yes, I did.

Q. It doesn't make any difference in the amount. It makes a difference if it should be held that it is includable in the Estate's return rather than her return? A. Yes, that is right. [95]

Mr. Jones: That is the only difference. Well, I think that is all."

Cross Examination

(By Mr. Neblett)

(Not material to assignments of error.)

Redirect Examination

(By Mr. Jones)

Thereupon, there was offered and received in evidence without objection a document referred to a Sunshine Mining Company resolution which was marked Petitioner's Exhibit No. 11.

(A photostatic copy of said exhibit is attached hereto and made a part hereof.)

Thereupon,

SHIRLEY D. PARKER,

a witness for the taxpayer, was duly sworn and testified as follows:

Direct Examination

(By Mr. Jones):

Mrs. Larson is my mother. I got up to Yakima about the next day after Mr. Larson's death on

(Testimony of Shirley D. Parker.)

June 7, 1934. I had not been there for a great many years. I took mother on a trip for her health and then came back in a few months. The first time we got back was the latter part of July 1934. From that time on, I had a part in the administration of the Larson Estate by the Yakima Bank; my mother arranged with Mr. Hardy, the president of the bank, which was the executor of the Estate, to employ me at the bank throughout the period of the executorship. [96]

My mother attended to very few of the business affairs herself, if any. I acted for her after Mr. Larson's death.

I have heard Mr. Hardy's testimony that there was some discussion with me about the optioning and sale of the Sunshine Mining Company's stock; there was some discussion about it after we got up here from California.

There was some discussion that mother's stock could not be interfered with or sold for Mr. Larson's debts or bequests. The discussion was among the attorneys, Mr. Hardy and Mr. Brown and his associate.

There was nothing done in 1934 in the way of approving or consenting to any sale by my mother of her interest in the community "Sunshine stock". The only time we ever petitioned specifically for mother to sell some stock for her was after some had been distributed out of the Estate under the

(Testimony of Shirley D. Parker.)

auspices of the Court so that mother could sell her own stock.

Cross Examination

(By Mr. Neblett):

I was not aware of the plan to distribute the stock on the New York Stock Exchange until after I got up here from California, the latter part of August, and the options were signed on June 30, 1934. That was the first time I learned about it. I hadn't heard any discussion about listing the stock on the New York Curb Stock Exchange prior to Mr. Larson's death. Prior to Mr. Larson's death, I was at Los Angeles, California. I had been there for about 25 years.

I knew several months after the option agreements had been entered into that they contained a limitation of the sale of any more stock of the Larson Community Estate. I don't know anything about the discussions had between the various stockholders in order to get the stock listed on the New York Curb. [97]

After Mr. Larson's death, I came back the last of July 1934, and then took my mother on a trip that winter, about Christmas time; and was gone several months, and got back again I think about the first of March, 1935. I don't think I got back from California as early as July 5, 1934, because I was gone over 30 days, I think, and didn't leave until between the 12th and the 14th of June, 1934. I read over Mr. Larson's will after his death. There

(Testimony of Shirley D. Parker.)

was a phrase in the will to the effect that they had at least three years to sell stock to pay bequests. I am familiar with the appointment of an administrator de bonis non with the will annexed in the Estate of A. E. Larson. I am the administrator de bonis non.

(Mr. Jones): I might say, so that your Honor will know what we are talking about, that in May of 1935 the Bank filed a final account and petition for discharge and the Estate having been practically administered, except for the payment of some legacies and the settlement of some taxes, the bank was relieved and there were reserved 15,000 shares of Sunshine Mining Company stock, together with some \$45,000 cash. The bank was discharged, and Mr. Parker was appointed administrator de bonis non to settle the unpaid bequests, and hold the cash and settle the taxes.

Thereupon, the individual income tax return of Mrs. Rose B. Larson for the year 1934 was offered and received in evidence and marked Petitioner's Exhibit No. 12.

(A photostatic copy is attached hereto and made a part hereof.)

(Petitioner-taxpayer rested.) [98]

Thereupon,

CARL M. STOLLE,

a witness for the Commissioner of Internal Revenue, was duly sworn and testified as follows:

Direct Examination

(By Mr. Neblett):

In 1934 I secured from the Estate of A. E. Larson options calling for the purchase of Sunshine Mining Company stock. My recollection is that it was 70,000 shares under option; and a so-called agreement of purchase in the amount of 10,000 shares, which later became 15,000 shares. I had options with other purchasers than the Larson Estate.

“Mr. Jones: May this testimony be understood to be under the same objection to the testimony as was submitted to Mr. Hardy’s?”

The Court: Yes.”

(Witness continuing):

Some of the holders of stock I talked to were Alec Miller, J. B. Cox and Mrs. Hull. I attempted to secure the options and shares because it came to my attention that Mr. Walter Seligman, of J. W. Seligman Company of New York City, was an owner of a substantial amount of stock. Through correspondence with him, it was developed that he would be very desirous of seeing the stock listed on the New York Curb, or at least at that time listing privileges obtained for trading in the stock on the New York Stock Exchange. It was in furtherance of that program that I endeavored to obtain options from the

(Testimony of Carl M. Stolle.)

larger stockholders of Sunshine Mining Company stock.

My activities up to the time of the death of Mr. A. E. Larson on June 7, 1934 were: Following the correspondence mentioned heretofore, I visited Yakima, Washington, and Kellogg, Idaho, a number of times, discussing this matter with Director L. H. Dills, Alec Miller, Mr. Carroll, Mr. J. B. Cox, and on one occasion, Mr. A. E. Larson. The only discussion I had with Mr. Larson [99] prior to his death relative to listing the stock on the New York Stock Exchange occurred, I believe, in the latter part of April or early in May. The exact date is not now clearly in my memory, but it was along about that time; and his distinct feeling was that he was against such a proposal. These four larger stockholders were to give the options in the first instance; they were Mr. A. E. Larson, Mr. J. B. Cox, Mr. Alec Miller, and Mrs. N. P. Hull, the widow of Mr. N. P. Hull who was originally one of the largest stockholders.

I had a conference with Mr. Hardy, Mr. Miller, Mr. Cox and Mr. Hull relative to acquiring options on their stock, and it was following Mr. Larson's death that I had my first consultation with Mr. Hardy.

Prior to my meeting with Mr. Hardy, as I have stated here before, a number of conversations with Mr. Miller and Mr. I. H. Dills, principally, and

(Testimony of Carl M. Stolle.)

Mr. Cox, but due to the fact that I was not able at that time to gain the consent or help of Mr. A. E. Larson, actual figures were not discussed; actual figures of the amount of options which I would require were not discussed until Mr. Hardy came into the picture following the death of Mr. Larson. After one or two, or perhaps on a third visit to Yakima following Mr. Larson's death, I made real progress with Mr. Hardy in selling the idea that it was a desirable thing. At that time I had, of course, in my own mind, formulated and then discussed with these gentlemen, the four mentioned heretofore, specific amounts. Now, while at the time I had no exact figure of percentage in mind,—my outline of the amount—, the total required figured approximately 40% of the various total holdings of these four enumerated.

I knew the total holdings of the Larson Estate; my best recollection is that I considered it to be 210,000 shares. It was my purpose to get 40% of [100] 210,000 shares. It was also my purpose to get 40%, or approximately that, of Mr. Hull's entire holdings, of Mr. Cox's entire holdings, and of Mr. Miller's entire holdings. I succeeded in getting approximately 40% of these gentlemen's entire holdings. The reason advanced as to why these large stockholders should give me 40% of their holdings was, briefly, because a company of that size and importance required for the benefit of their stockholders a much better and broader market than at

(Testimony of Carl M. Stolle.)

that time existed. The stock, I believe, was traded in,—so-called—traded over the counter in Seattle, and was listed in Spokane; but the total amount of trading in those centers obviously was very limited.

It was further suggested that through such an operation—that is, broadening of the market, making the stock that was then not very negotiable—a readily salable item,—would enhance its value. It would enhance the value of the Sunshine Mining Company stock. I said something to these stockholders relative to any enhancement in value of the stock remaining in their various possession. As a matter of fact, the specific statement, as I recall it, was to the effect that—as an example—if a person owned 10,000 shares, and gave us an option on 4,000 shares, that the result of the operation in its entirety would mean that the remaining 6,000 shares would equal in market value the then current market value for the entire 10,000 shares in addition, of course, to which they would have the cash consideration for the 4,000 shares under option. This illustration that I have just given you, was used in connection with the acquisition of these options from these four large stockholders.

These options that I acquired were later written up. I heard the testimony regarding them here today. I was familiar with the fact that each of these options contained the name of a specific certificate. [101] The options were drawn under my

(Testimony of Carl M. Stolle.)

direction. These same specified certificates were later acquired when the options were exercised.

Cross Examination

(By Mr. Jones):

I never talked to Mrs. Larson about any sale of her stock. I talked to Mr. Parker. In talking with Mr. Parker, I did not distinguish between the sale of any interest of Mrs. Larson and the sale of any interest of the decedent in the stock; I do not believe so.

I wanted to tie up a certain number of shares. I just didn't start out saying, "I want such and such a percentage of such and such stockholders". I wanted a certain amount of shares, and it just happened to work out at 40% of the total of the options. I had no specific percentage figure in mind, but I did have a memorandum showing the number of shares held by the four people mentioned. Of that amount, it happened to figure out somewhere between $\frac{1}{3}$ and 40% of each of those holdings, the amounts I wanted as a minimum requirement. It was first figured I wanted 80,000 shares from the Larson interests, and ultimately it was increased to 85,000 shares. It didn't make any difference to me whether it came out of Mr. or Mrs. Larson's half. I didn't make any attempt to distinguish it.

Thereupon,

CARROLL M. HULL,

a witness for the Commissioner of Internal Revenue, was duly sworn and testified as follows:

Direct Examination

(By Mr. Neblett):

I was acquainted with the officers of the Sunshine Mining Company in [102] Yakima in June, 1934; I was a director at that time. I knew Mr. Hardy, Mr. Cox, Mr. Stolle and Mr. Miller. Mother and I were interested in Sunshine Mining Company stock. At that time, my mother had 58,000 and I believe it was 58,176—I am not sure of the small numbers,—but it was 58,000 and something. I had just a few shares at that time,—very few. It was just my mother's stock that was approached relative to the option. I had a conference representing my mother with Mr. Miller, Mr. Hardy, and Mr. Cox relative to the options of the stock of the larger stockholders.

At the first conference, when this was instigated, I was in the East at the time. I was notified by telegram of Mr. Larson's death, and I got here as soon as I could get here. I got here about the middle or tenth, I think, of July. And I talked to the various ones,—Mr. Hardy and Mr. Miller, and to Mr. Stolle.

“Mr. Jones: I meant to suggest,—I assume this testimony is also subject to my objection?

(Testimony of Carroll M. Hull.)

The Court: Yes, it may be subject to the same ruling.

Mr. Jones: And exception."

Substantially the same things that have been testified to here were said about the optioning so many shares of my mother's stock,—that our remaining stock would be worth substantially as much as the whole amount was before, and it was necessary for these people to have about that amount of stock and that the deal was subject,—that we all go in on it.

We sold 10,000 shares of mother's outright and optioned 22,000 shares. We sold 10% and then optioned approximately 40%; I think the amount optioned was about 38%. [103]

I don't think we would have optioned our stock if the other stockholders had not optioned theirs.

Cross Examination

(By Mr. Jones):

I didn't have any talk with my mother about these options. I did not have any talk with Mr. Parker about them. I did not know anything about whether his share or interest was being sold or intended to be sold as far as the Larson estate goes.

Thereupon,

SHIRLEY D. PARKER,

was recalled as a witness for the Commissioner of Internal Revenue, and testified as follows:

Direct Examination

(By Mr. Neblett):

I am familiar with the suit in the matter of the Estate of A. E. Larson, deceased, and Shirley D. Parker, administrator de bonis with the will annexed of the Estate of A. E. Larson, deceased, and others, against R. M. Hardy, Docket No. 8561.

"Now, in bringing that suit, Mr. Parker, did you or did you not act as the agent of your mother, Rose B. Larson?

Mr. Jones: I object to that as calling simply for a conclusion. It is calling for his conclusion.

Mr. Neblett: We think that it is a proper question, your Honor.

Mr. Jones: The record shows who he acted for, and shows in detail in whose behalf the suit was brought. [104]

* * * * *

The Court: You may answer the question.

A. Well, I brought that before the Superior Court of the State of Washington to help probate an estate. It hadn't been finished probating yet by the bank.

Q. (By Mr. Neblett): In bringing that suit, weren't you acting for and on behalf of your mother, Rose B. Larson?

(Testimony of Shirley D. Parker.)

A. Not any more than I was for any other taxpayers that have rights to be adjudicated. The estate hadn't been probated yet. It hadn't been finished. I am administrator de bonis non there.

Q. I understand that. A. Yes.

Q. But didn't you talk to your mother prior to the bringing of this suit?

A. Yes, I have talked to my mother many times.

Q. Relative to this petition that you filed?

A. Yes, I have discussed that.

Q. Didn't she acquiesce in your bringing it?

A. No, she objected to my bringing it.

Q. She objected to your bringing it?

A. Yes, she didn't like it, and I said there were some matters that ought to be straightened out in there, and we ought to bring it.

Q. Whom were you representing then, in your opinion?

A. I was representing our own interests and the taxpayers of the County.

Mr. Neblett: Just a minute, your Honor. I think that I can straighten this out.

If your Honor please, if you will just bear with me a second, I think that I can find this.

The Court: All right.

Q. (By Mr. Neblett): Mr. Parker, I ask you if in the matter of A. E. Larson, deceased, and also Shirley D. Parker, administrator, No. 28930, you gave a deposition, the deposition of Shirley D. Parker, taken September 29, 1936, before Fred

(Testimony of Shirley D. Parker.)

Velikanje, Notary Public, Yakima County, Washington.

Do you recall giving a deposition at that time?

[105]

A. Well, I don't recall the exact date. I will recall it probably if I see it.

Q. All right. Let me refresh your recollection here now.

* * * * *

Q. (Mr. Neblett) Did you further testify in this deposition as follows:

‘Q. In other words, he thought the stock would raise so that the balance of the stock would be worth as much as all the stock before it was listed?

A. Yes. Thought when they got it on the market, Seligman would put the stock up so the balance would be worth practically the same as it was before it was listed.

Q. Tell you anything else? Tell you about the reason of the 10,000 and 70,000?

A. Well, he said, “We will get this money on hand and pay off these legacies.”

Q. And is that all he told you?

A. Well, practically all, details about those points.

Q. Did he tell you how much stock Seligman said he had to have?

A. Yes, he told me that 40% of the Larson estate, 40% of the Miller holdings, 40% of the

(Testimony of Shirley D. Parker.)

Cox holdings, and 40% of the Hull holdings, were necessary.

Q. Necessary for whom?

A. Seligman and Company, before they would list the stock.

Q. Whom did he tell you had told him that; where did he get his information about that?

A. Well, I don't know; I presume from Grande-Stolle.

Q. Let's see, the Larson estate had 210,974 shares, approximately 211,000?

A. Yes.

Q. When did he tell you about the 40% stuff, prior to the time you went before Judge Milroy the first time?

A. I think so, yes.

Q. Let's see, 40% of 210,974 would be 84,389 shares, and you were only optioning and listing 80,000—10,000 selling and 70,000 optioning. Did he say it would be 40% or approximately 40%?

A. Probably said approximately 40%, but he also elaborated on the fact that Mr. Miller and the others put up a bigger percentage of their holdings than the Larson estate. He said, "See, I've given you a good deal". His idea all the time was on selling me what a good deal he made for the Larson estate.'

This is the deposition of Shirley D. Parker, taken in the matter of the Estate of A. E. Larson.

(Testimony of Shirley D. Parker.)

Now, do you remember testifying like that, Mr. Parker? [106]

Mr. Jones: I object to that as irrelevant and immaterial, and not proper cross examination, if that is what it is supposed to be.

The Court: This is his own witness now.

Mr. Neblett: That is right.

Mr. Jones: Then, if he makes him his own witness,—it isn't tied up. If he is just moving the complaint over here, what he has read there hasn't any relation to the complaint.

The Court: The only relation I can see is whether it might be contradictory to something which has been given before. Of course, being his own witness, he can't impeach him, but he is in somewhat the nature of an adverse witness here.

I will ask him if he so testified?

The Witness: I so testified. It sounds like it is.

The Court: Now, I think that is about as far as you can go with this deposition.

Mr. Neblett: All right, your Honor.

The Court: And this offer to introduce the records and the case of the Estate of A. E. Larson against Hardy, is it,—or the executor?

Mr. Jones: Against Hardy and the——

The Court: Interposing) It is entirely too tenuous in the matter of any involving of the petitioner in the present tax case.

Mr. Neblett: Yes. If your Honor please, I would like to refer to the fact, too, that the findings of

(Testimony of Shirley D. Parker.)

fact of this whole suit, the petitioner's which I was trying to introduce here, is referred to in A. E. Larson, No. 27481, Superior Court of Washington, August 25, 1939; 93 Pac. 2, (431). That is the case which includes the findings of fact based on this petition.

The Court: Well, does it make any finding as to whether it is community property sold or not?

The Witness: No.

Mr. Neblett: No, your Honor.

The Court: I will sustain the objection.

Mr. Neblett: Could we have this complaint marked for identification as an offer of proof? [107]

The Court: You may have it marked for identification and offer it, and the offer will be denied and the exception allowed.

What will be the number?

The Clerk: Marked for identification as Respondent's Exhibit 'E'.

(Document referred to, (M. F. I.) Petition and Complaint, was marked for identification as Respondent's Exhibit E.)"

(Witness excused.)

Thereupon, there was offered in evidence a copy of a Petition for Appointment of Administrator de bonis non with the will annexed. Objection to materiality of the document was overruled, and the

said document was admitted and marked Respondent's Exhibit "F".

(A photostatic copy is attached hereto and made a part hereof.)

With permission and without objection, taxpayer offered and there were received in evidence a copy of Petition for Family Allowance filed June 14, 1934, and order authorizing it, which documents were marked as Petitioner's Exhibit No. 13. (A photostatic copy of each is attached hereto and made a part hereof.)

"Mr. Neblett: May I ask the purpose in offering that?

Mr. Jones: Simply to tie up with the accounts that have been filed here which show that there was to be a payment to Mrs. Larson of a certain sum, and whether those payments made to her should be charged as income, and to that extent the allowance of \$5,000 and \$1,500 a month, that would be charged against Corpus and not income.

Now, the next thing, I sent you a list of claims, and I understood if you didn't advise me to the contrary, you would have no objection.

Mr. Neblett: Could I see the list of claims?

Mr. Jones: Yes, I have got it here. Here it is.

(Document handed to Mr. Neblett by Mr. Jones.) [108]

Mr. Neblett: Mr. Jones, don't all of these claims appear in the executor accounts?

Mr. Jones: They appear in the accounts, but they don't appear separately set forth. This is a copy of the claims on file.

Mr. Neblett: We have no objection, subject to check.

Mr. Jones: I have sent you a copy.

Mr. Neblett: I have a copy.

Mr. Jones: The next number, then, is 14?

The Clerk: 14.

The Court: Admitted.

(Document referred to, List of Claims, marked and received in evidence as Petitioner's Exhibit 14.)"

(A photostatic copy of Petitioner's Exhibit 14 is attached hereto and made a part hereof.)

"Mr. Jones: Is there any question but that the 85,000 shares referred to by the respondent in a deficiency letter is the same 85,000 shares that we have been considering here in the testimony?

Mr. Neblett: If your Honor please, I don't think there is any question at all about that. We have been proceeding on the theory that this 85,000 shares here is involved in this case.

Mr. Jones: I just want to be sure that that is the 85,000 shares that respondent refers to, so there won't be any presumption that there is another 85,000 shares not covered in the testimony.

Mr. Neblett: No, no; that is the 85,000 shares.

* * *

(Both parties rested.) [109]

The foregoing is all of the material evidence ad-
duced at the hearing before the Board of Tax Ap-
peals, and the same is approved by the undersigned.

J. P. WENCHEL,

Chief Counsel, Bureau of In-
ternal Revenue, Counsel for
Petitioner on Review.

(Sgd) H. B. JONES,

Counsel for Respondent on
Review.

The foregoing is all of the material evidence ad-
duced at the hearing, and in order that the same
may be preserved and made a part of the record,
this Statement of Evidence is duly approved and
settled this day of, 1942.

.....
Member, U. S. Board of Tax
Appeals.

CRM/csl

3/1942

[Endorsed]: Filed Apr. 28, 1942. [110]

SURETY FINANCE COMPANY
No. 20287
Yakima, Washington
3/10/34
F. E. [illegible]
THREE HUNDRED DOLLARS
THE YAKIMA FIRST NATIONAL BANK
UNITED STATES DEPOSITORY
YAKIMA, WASHINGTON
SURETY FINANCE COMPANY
F. E. [illegible]
Solv. *a-1*



U.S. BOARD OF TAX APPEALS
D.V. *2* *55813-4*
NOV 10 1940
1

a-3

PETITIONER'S EXHIBIT 2

Surety Finance Company

I, Maynard Cary, Assistant Secretary of the Surety Finance Company of Yakima, hereby certify that at a meeting of the Board of Trustees of said corporation duly held on the 19th day of December, 1934, at which a quorum was present, the following resolution was adopted:

“It was moved by Herbert A. Shaw, seconded by William B. Dudley, unanimously carried, that the regular 4% dividend be declared to all stock holders of record payable December 31, 1934.”

In Witness Whereof, I have hereunto set my name and affixed the corporate seal of the said Surety Finance Company of Yakima, this 11th day of September, 1940.

[Seal]

M. CARY,

Assistant Secretary.

State of Washington,
County of Yakima—ss.

Subscribed and Sworn to before me this 11th day of September, 1940, by the above named Maynard Cary, known to me to be the Assistant Secretary of the Surety Finance Company of Yakima, a corporation.

[Seal]

E. M. FISHER,

Notary Public in and for the State of Washington,
residing in Yakima. [114]

PETITIONER'S EXHIBIT 3

In the Superior Court of the State of Washington,
in and for Yakima County.

(In Probate)

Filed 2-27-35

No. 8561

In the Matter of the Estate of A. E. LARSON,
Deceased.

PETITION TO SELL PERSONAL
PROPERTY

Comes now the Yakima First National Bank, and respectfully shows to the court as follows, to-wit:

1.

That it is the duly appointed, qualified and acting executor of the above entitled estate.

2.

That no inventory has as yet been filed herein, but that included amongst the assets of said estate are 210,974 shares of stock of the Sunshine Mining Company.

3.

That on the 26th day of July, 1934, your petitioner was authorized to sell outright 10,000 shares of said Sunshine Mining stock at the rate of \$5.82½ a share to Grande, Stolle & Company, payment to be made at the rate of \$2.00 per share on the 1st day of September, 1934, and the balance on or before the 15th day of December, 1934. That the said Grande, Stolle & Company have now offered to

purchase outright for cash 15,000 shares of said stock to net a return of \$5.82½ per share to said estate, and your petitioner believes it for the best interest of said estate that said offer be accepted and that said additional 5000 shares be sold, in order that it will [115] have sufficient funds on hand to pay the costs of administration, the widow's allowance and the special bequests.

Wherefore, your petitioner prays for an order authorizing it to sell 15,000 shares of said Sunshine Mining stock to Grande, Stolle & Company, a corporation, on the basis of \$5.82½ per share.

RIGG, BROWN & HALVERSON,
Attorneys for Petitioner.

State of Washington,
County of Yakima—ss.

E. P. Hoffman, being first duly sworn, on oath deposes and says: That he is the trust officer of Yakima First National Bank, petitioner above named, and makes this verification for and on its behalf, being authorized so to do; that he has read the within and foregoing Petition to Sell Personal Property, knows the contents thereof and believes the same to be true.

E. P. HOFFMAN

Subscribed and sworn to before me this 31st day of July, 1934.

NAT U. BROWN,
Notary Public in and for the State of Washington,
residing at Yakima. [116]

PETITIONER'S EXHIBIT 4

In the Superior Court of the State of Washington,
in and for Yakima County.

No. 8561

In the Matter of the Estate of A. E. LARSON,
Deceased.

ORDER AUTHORIZING SALE OF
PERSONAL PROPERTY

This matter coming on to be heard upon the petition of the Yakima First National Bank, as executor, for authority to sell 15,000 shares of capital stock of the Sunshine Mining Company to Grande, Stolle & Company to net the estate \$5.821½ per share, the executor being represented by its counsel, Rigg Brown & Halverson, and Rose Larson, the surviving widow and residuary legatee, being represented by her agent, Shirley Parker, and the court having heard the evidence and being fully advised in the premises,

Now, Therefore, It Is Ordered that the executor be and it is hereby authorized to sell 15,000 shares of stock of the Sunshine Mining Company for the net price of \$5.821½ per share; and

It Is Further Ordered that this order shall supersede the order made on the 26th day of July, 1934, insofar as the sale of the 10,000 shares of stock were concerned, but shall have no effect upon the order permitting the executor to grant an option to said Grande, Stolle & Company for the sale of 70,000 additional shares.

Done this 31st day of July, 1934.

R. B. MILROY,
Court Commissioner.

Filed 2-27-35. [117]

PETITIONER'S EXHIBIT 5

In the Superior Court of the State of Washington,
In and For Yakima County

No. 8561

In the Matter of the Estate
of
A. E. LARSON, Deceased.

PETITION FOR PARTIAL DISTRIBUTION
OF ESTATE

Comes now Yakima First National Bank, executor above named, and petitioning the court for authority to make a partial distribution of the Estate herein, shows to the Court as follows, to-wit:

1.

That the final report of your petitioner as executor herein is on file and that such final report, together with the inventory shows that included within the estate herein was a total of 210,974 shares of capital stock of Sunshine Mining Company, a corporation, of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, shares to the number of

125,974 of which said shares Rose B. Larson, as surviving spouse is the owner of 105,487.

2.

That the said Rose B. Larson, as surviving spouse, desires to have distributed to her 15,000 shares of said stock and that your petitioner, therefore, prays for an order of the court permitting and authorizing it to distribute to the said Rose B. Larson forthwith, 15,000 shares of stock of Sunshine Mining Company.

RIGG, BROWN & HALVERSON,
Attorneys for Petitioner. [118]

State of Washington,
County of Yakima—ss.

E. P. Hoffman, being first duly sworn, on oath deposes and says: That he is the trust officer of Yakima First National Bank, petitioner above named, and makes this verification for and on its behalf, being authorized so to do; that he has read the within and foregoing Petition For Partial Distribution Of Estate, knows the contents thereof, and believes the same to be true.

E. P. HOFFMAN

Subscribed and sworn to before me this 1st day of May, 1935.

NAT U. BROWN,
Notary Public in and for the state of Washington,
residing at Yakima. [119]

PETITIONER'S EXHIBIT 6

In the Superior Court of the State of Washington,
In and For Yakima County.

No. 8561

In the Matter of the Estate
of
A. E. LARSON, Deceased.

ORDER PERMITTING AND AUTHORIZING
PARTIAL DISTRIBUTION

This matter coming on to be heard upon the petition of Executor herein for authority to distribute to Rose B. Larson 15,000 shares of stock of the Sunshine Mining Company, and it appearing to the court that included within the assets of the above entitled estate was an aggregate of 210,974 shares of the capital stock of the Sunshine Mining Company and that all of said property was community property of the decedent and Rose B. Larson, his widow, and

It further appearing that said Rose B. Larson is entitled, as her share of the community property, to receive from said executor, upon the closing of said estate, a total of 105,487 shares, and no good reason appearing why a partial distribution should not at this time be made.

Now, Therefore, it is ordered that the Executor herein be and it is hereby authorized and directed to distribute to said Rose B. Larson 15,000 shares of the Sunshine Mining Company, a corporation.

Dated this 1st day of May, 1935.

R. B. MILROY,

Court Commissioner

[120]

PETITIONER'S EXHIBIT 7

In the Superior Court of the State of Washington,

In and For Yakima County.

(In Probate)

No. 8561

In the Matter of the Estate

of

A. E. LARSON, Deceased.

INVENTORY AND APPRAISEMENT

I, Thomas Granger, County Clerk and ex-officio Clerk of said Superior Court, do hereby certify that Alex Miller, Geo. H. Bradshaw and Lloyd L. Wiehl were duly appointed appraisers of the above entitled estate, by order of said Superior Court duly entered on the 17th day of July, 1934.

Witness my hand and seal of said court this 22d day of November, 1934.

THOMAS GRANGER,

Clerk of Superior Court.

By E. M. POMEROY,

Deputy.

State of Washington,
County of Yakima—ss.

Alex Miller, Geo. H. Bradshaw and Lloyd L. Wiehl, duly appointed appraisers of the above entitled estate, being duly sworn, each for himself says: I will truly, honestly and impartially appraise the property of said estate, which shall be exhibited to me, according to the best of my knowledge and ability.

ALEX MILLER
GEO. H. BRADSHAW
LLOYD L. WIEHL

Subscribed and sworn to before me this 22d day
of November, 1934.

C. W. HALVERSON,
Notary Public in and for the State of Washington,
residing at Yakima.

Filed 11-26-34. [121]

DESCRIPTION OF REAL PROPERTY OF SAID ESTATE

	Assessed Land	Valuation Improvements	Appraised Valuation
	\$	\$	
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of Yakima Heights Residence Tract according to the official plat thereof on file and of record in the office of the Auditor of Yakima County, Washington, together with all the tenements, hereditaments and appur- tenances to the same belonging or in anywise appertaining	2,650.00	4,500.00	20,000.00

	Assessed Land	Valuation Improvements	Appraised Valuation
Lots 25, 26, 27, 28 and 29, in Block 51 of the City of Yakima, formerly North Yakima, according to the official plat of the Town of North Yakima, now on file and of record in the office of the Auditor of Yakima County, Washington.....	14,100.00	39,000.00	130,000.00
The East 15 feet of Lot 10 and all of Lots 11 and 12 in Block 31 of the town of North Yakima, now City of Yakima, according to the official plat thereof on file and of record in the office of the Auditor of Yakima County, Washington	22,500.00	126,900.00	300,000.00
Lots 9, 10 and 11 in Block 3 of the Town plat of Grandview in the County of Yakima, State of Washington, according to the official plat thereof on file and of record in the office of the Auditor of said County and State	390.00	2,030.00	3,500.00
Lots 7 and 8 in Block 18 of the Town of Grandview, according to the official plat thereof now on file and of record in the office of the Auditor of Yakima County, Washington.....	760.00	3,810.00	5,000.00
The East Half of the Southwest quarter and the North-half of the North-west quarter of the Southwest quarter of Section 6, Township 8, North of Range 28 E.W.M., in the County of Benton, State of Washington.....	80.00	None	1.00
An un-divided one-half interest in the North half of the Northeast quarter and the East half of the Northwest quarter of Section 24, Township 20 North, Range 9 E.W.M., containing 160 acres, more or less, situated in King County, State of Washington.....	1,650.00	None	1,000.00

	Assessed Land	Valuation Improvements	Appraised Valuation
Lots 6, 7, 8 and the East 5 feet of 9, Block 124, 1st Addition to the City of Wapato, Washington.....	240.00	880.00	2,200.00 [122

Lots 1, 2, 3, 4, 5, and the North half
of Lot 6 in Block 2, of the original
Town of Ephrata, Grant County,
Washington.

This property sold on contract to
Mr. Fred Jones, Ephrata. Deed to
be delivered upon payment of
amount due, \$36.07.....

36.0

DESCRIPTION OF PERSONAL PROPERTY OF SAID ESTATE

Appraised
Valuation

Note dated April 3, 1923, in the original amount of \$100. due September 1, 1924, bearing interest at 8%, signed by Donald H. Cameron. Nothing paid on principal or interest.....	None
Note dated January 29, 1929, in the original amount of \$200. due October 1, 1929, bearing interest at the rate of 8%, signed by Gertrude Howard, secured by chattel mortgage on piano and bench. Nothing paid on principal or interest.....	None
Note dated November 19, 1923, in the sum of \$5000.00, due January 1, 1928, bearing interest at the rate of 8%, signed by A. E. Howard and Grace M. Howard, husband and wife. There is a balance due of \$3400. principal, plus \$1783.10 in- terest and \$2377.00 taxes paid by the deceased, making a total due of \$7560.10. Said note is se- cured by a mortgage on the following described real property situate in King County, State of Washington:	

	Appraised Valuation
Lots 29 to 33, inclusive, in Block 20 Lake Union Shore Lands; also Lots 27 to 31, inclusive and Lots 36 to 40 inclusive, in Block 37, Map of Brooklyn Addition to Seattle, Washington, according to plat recorded in Vol. 7 of Plats at page 32 of the records of King County, Washington	2,000.00
One-half interest in a note dated December 1, 1923, due Feb. 14, 1925, in the sum of \$3869. bearing interest at the rate of 6% per annum, signed by Arthur Johnson and Elma D. Johnson. There is a balance due on said note in the sum of \$1934.50. Said note is payable to the order of Fred Chandler and A. E. Larson.....	None
Note dated October 19, 1929, and due October 19, 1932, in the original sum of \$3600 bearing interest at the rate of 7% per annum, signed by W. E. Lovell and Frances A. Lovell. There is a balance due on said note in the sum of \$3350 principal, plus \$387.57 interest, or a total of \$3737.57	3,737.57
Note dated August 27, 1928, and due August 27, 1929, in the original sum of \$500, bearing interest at 8% per annum, signed by Ralph O. Olson, on which there is a balance due and unpaid in the sum of \$319.80.....	319.80
Note dated March 7, 1925, in the sum of \$100, bearing interest at 8% per annum, due on demand, signed by Ralph O. Olson and Barbara B. Olson. Nothing paid on principal or interest.....	None [123]
Note dated September 10, 1924, in the sum of \$300. bearing interest at 7% per annum, due on demand, signed by Ralph O. Olson and Barbara B. Olson. Nothing paid on principal or interest.....	None

Appraised
Valuation

Note dated January 29, 1925, in the sum of \$100. bearing interest at the rate of 7% per annum, due on demand, signed by Ralph O. Olson and Barbara B. Olson, husband and wife. Nothing paid on principal or interest.....	None
Note dated November 1, 1926, due May 1, 1927, in the sum of \$500. bearing interest at the rate of 8% per annum, signed by S. J. Whitcombe. There is a balance due of \$500 principal and \$244 interest, or a total of \$744.00.....	None
Note dated November 1, 1926, due November 1, 1927, in the sum of \$500. bearing interest at 8% per annum, signed by S. J. Whitcombe. There is a balance due of \$500. principal and \$244. interest, or a total of \$744.00.....	None
Note dated December 23, 1931, in the sum of \$8000. bearing interest at 8% per annum, signed by D. A. McDonald, Alex E. McCredy and Harry Jones, on which there is a balance due including interest in the sum of \$4468.17.....	3,000.00
Note dated April 1, 1933, in the sum of \$592.33, bearing interest at 7% per annum from date until paid, signed by W. A. McLaughlin, due December 30, 1934. There is a balance due of \$592.33 principal and \$17.98 interest, or a total of \$610.31.....	610.31
Note dated April 22, 1933, in the sum of \$770.76, bearing interest at 8% per annum from date until paid, due April 21, 1934, signed by J. E. Bittner, Jr. There is a balance due of \$770.76 principal and \$10.20 interest, or a total of \$780.96	780.96
Note dated February 13, 1934, in the sum of \$274.25, bearing interest at 8% from date until paid, due February 13, 1935, signed by W. C. Ketchum. There is a balance due of \$274.25 principal and \$7.02 interest, or a total of \$281.27	281.27

	Appraised Valuation
Note dated March 3, 1934, in the sum of \$700. bearing interest at 8% per annum from date until paid, due September 3, 1934, signed by Delmar F. Bice. There is a balance due of \$700. principal and \$14.58 interest, or a total of \$714.58.....	714.58
Note dated March 9, 1934, in the sum of \$216.85, bearing interest at 8% per annum from date until paid, due July 9, 1934 signed by W. G. Boland. There is a balance due of \$216.85 principal and \$6.53 interest, or a total of \$223.38.....	None
Note dated March 10, 1934, in the sum of \$450.00, bearing interest at 8% per annum from date until paid, due December 10, 1934, signed by Geo. and F. Mullins. There is a balance due of \$410 principal and \$8.65 interest, or a total of \$418.65	205.00 [124]
Note dated May 4, 1934, in the sum of \$491.78, bearing interest at 8% per annum from date until paid, due August 1, 1935, signed by Lafe Bond. There is a balance due of \$481.78 principal and \$3.61 interest or a total of \$495.39.....	None
Note dated May 4, 1934, in the sum of \$297.00, bearing interest at 8% per annum after maturity due April 4, 1935, signed by Hull & Shropshire, on which there is a balance due of \$297.00.....	297.00
Note dated May 15, 1934, in the sum of \$690, bearing interest at 8% per annum after maturity due May 16, 1935, signed by Chester Johnston, on which there is a balance due of \$690.00	345.00
Note dated December 15, 1932, in the sum of \$25. bearing interest at 8% per annum from date until paid, due July 10, 1933 signed by Paul Benoit, on which there is a balance due of \$25.....	25.00
Note dated January 29, 1934, in the sum of \$532.45, bearing interest at 8% per annum from date until paid, due January 30, 1935, signed by J. E. Bittner, Sr. There is a balance due of \$532.45 principal, and \$15.26 interest, or a total of \$547.71	372.00

	Appraised Valuation
City of Yakima L.I.D. #395 bonds, Nos. 51 to 69 incl., of the par value of \$500. each, bearing in- terest at 6% per annum, due 1937.....	9,022.75
City of Yakima L.I.D. #422 Bonds, Nos. 51 to 73 incl., of the par value of \$500. each, bearing interest at 6% per annum, due 1938.....	11,829.67
City of Yakima L.I.D. #404 Bonds, Nos. 55 to 74 incl. of the par value of \$500. each, bearing in- terest at 6% per annum, due 1938.....	5,523.33
City of Yakima L.I.D. #386 Bonds, Nos. 40 to 47 incl., of the par value of \$100. each, bearing in- terest at 6% per annum, due 1936.....	660.00
City of Yakima L.I.D. #374 Bonds, Nos. 18. of the par value of \$500. bearing interest at 6%, due 1935	517.25
City of Yakima L.I.D. #372 Bonds, Nos. 13 to 27 incl., of the par value of \$500. each, bearing in- terest at 6%, due 1935.....	3,296.25
Yakima County Sub-district #7, Drainage Improve- ment District #3, Bonds, Nos. 125, 127 and 141 to 152 incl. 165 to 177 incl. 191 to 202 incl. and 215 to 219 incl. of the par value of \$500. each, bearing interest at 6½%, variable maturities.....	11,633.64
Yakima County Sub-district B, Drainage District No. 18, Bonds Nos. 24 to 28 incl, of the par value of \$200. each, bearing interest at 6%, due 1935.....	1,026.17
Drainage District No. 31 Bonds, Nos. 55 to 60 incl. and 86, of the par value of \$500. each, Yakima County Drainage Improvement bearing interest at 6%, due 1937.....	1,295.00
	[125]
Leo S. Ross Construction Company Bonds, Nos. 58 to 60 incl. due 1936, 63 to 67 incl. due 1937 and 88 to 97, incl. due 1938, of the par value of \$1000. each, bearing interest at 7%.....	19,025.86

	Appraised Valuation
Leo S. Ross Construction Company Bonds, Nos. 52 to 57 incl. due 1936, 61 to 62 due 1937, 68 to 87 incl. due 1938, of the par value of \$500.00 each, bearing interest at 7%.....	13,017.69
Naches Court Apartment Bonds, Nos. 9, 32, 10, 33 to 37 incl. 69 to 84 incl. of the par value of \$500. each, bearing interest at 6%, due 1935.....	9,000.00
Y.M.C.A. Dormitory Bond, No. 218, due April 4, 1933, of the par value of \$100.....	None
Monumental Mining Company Prior Lien Gold Bonds, Nos. 36 to 50 incl., of the par value of \$100. each, bearing interest at 8%, due August 1931	None
Monumental Mining Company Prior Lien Gold Bonds, Nos. 149 to 154 incl., of the par value of \$250. each, bearing interest at 8%, due August, 1931	None
Monumental Mining Company Prior Lien Gold Bonds, Nos. 221 to 224 incl., of the par value of \$500. each, bearing interest at 8%, due August, 1931	None
The Alliance Mining Company Bonds, Nos. 370 to 379 incl. of the par value of \$100. each, bearing interest at 6%, due Dec. 1, '24.....	None
Cert. No. 2831 for 7305 shares of capital stock of the Sunshine Mining Company of the par value of 10¢ per share.....	50,404.50
Cert. No. 2996 for 11657 shares of capital stock of the Sunshine Mining Co. of the par value of 10¢ per share	80,433.30
Cert. No. 2826 for 1000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	6,900.00
Cert. No. 2821 for 2000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	13,800.00

Appraised
Valuation

Cert. No. 2827 for 1109 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	7,652.10
Cert. No. 2822 for 5000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	34,500.00
Cert. No. 2792 for 1500 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	10,350.00
Cert. No. 2718 for 2250 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	15,525.00
Cert. No. 2714 for 16632 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	114,760.80
Cert. No. 2703 for 2100 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	14,490.00
Cert. No. 1147 for 10000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	58,250.00
	[126]
Cert. No. 1551 for 2500 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	17,250.00
Cert. No. 1357 for 2000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	13,800.00
Cert. No. 1388 for 52921 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	365,154.90
Cert. No. 738 for 5000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	29,125.00
Cert. No. 818 for 500 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	3,450.00

	Appraised Valuation
Cert. No. 1346 for 30000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	207,000.00
Cert. No. 739 for 5000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	34,500.00
Cert. No. 670 for 2000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	13,800.00
Cert. No. 601 for 1000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	69,000.00
Cert. No. 788 for 500 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	3,450.00
Cert. No. 630 for 17000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	117,300.00
Cert. No. 633 for 10000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	69,000.00
Cert. No. 640 for 3000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	20,700.00
Cert. No. 654 for 5000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	34,500.00
Cert. No. 736 for 5000 shares of capital stock of the Sunshine Mining Company, of the par value of 10¢ per share.....	34,500.00
Cert. No. 42 for 52½ shares of Curtis-Wiley Marine Salvors capital stock, of no par value.....	None
Cert. No. 490 for 10,000 shares of capital stock of the Monumental Mining Company, of the par value of 10¢ per share.....	None

	Appraised Valuation
Cert. No. 21 for 20,000 shares of capital stock of the Monumental Mining Company, of the par value of 10¢ per share.....	None
Cert. No. 94 for 30,000 shares of capital stock of the Monumental Mining Company, of the par value of 10¢ per share.....	None
Cert. No. 392 for 10,000 shares of capital stock of the Monumental Mining Company, of the par value of 10¢ per share.....	None
Cert. No. 2790 for 100 shares of stock of the Old National Corporation Class A, of no par value.....	None
Cert. No. 73 for 135 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	10,800.00 [127]
Cert. No. 76 for 100 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	8,000.00
Cert. No. 40 for 50 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	4,000.00
Cert. No. 23 for 150 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	12,000.00
Cert. No. 48 for 22 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	1,760.00
Cert. No. 50 for 100 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	8,000.00
Cert. No. 51 for 17 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	1,360.00
Cert. No. 52 for 170 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	13,600.00

	Appraised Valuation
Cert. No. 60 for 105 shares of capital stock of the Surety Finance Company of the par value of \$100. per share.....	8,400.00
Cert. No. 64 for 51 shares of capital stock of the Surety Finance Company, of the par value of \$100. per share.....	4,080.00
Cert. No. 351 for 6 shares of capital stock of the Texwa Oil Company, of no par value.....	None
Cert. No. 352 for 90 shares of capital stock of the Texwa Oil Company, of no par value.....	None
Cert. No. 353 for 30 shares of capital stock of the Texwa Oil Company, of no par value.....	None
Cert. No. 12 for 70 shares of capital stock of the United Investment Corporation, of the par value of \$20. per share.....	None
Cert. No. 2 for 5 shares of Preferred capital stock of the Yakima Country Club Holding Company, of the par value of \$200. per share.....	None
Cert. No. 96 for 1 share of Common capital stock of the Yakima Country Club Holding Company, of the par value of \$100. per share.....	None
Cert. No. 1296 for 16 shares of capital stock of Yakima Masonic Temple Assn., of the par value of \$25. per share.....	200.00
Cert. No. 25 for 300 shares of capital stock of Yakima Investment Corporation, of the par value of \$40. per share.....	6,000.00
Cert. No. 51 for 175 shares of capital stock of Yakima Hardware Company, of the par value of \$100. per share.....	14,000.00
Cert. No. 56 for 185 shares of capital stock of Yakima Hardware Company, of the par value of \$100. per share.....	14,800.00
Cert. No. 42 for 50 shares of capital stock of West Side National Bank, of the par value of \$100. per share	7,250.00

	Appraised Valuation
Cert. No. 380 for 1281 shares of capital stock of the Yakima Holding Corporation, of no par value.....	16,012.50 [128]
Cert. No. 243 for 400 shares of capital stock of the Yakima Holding Corporation, of no par value.....	5,000.00
Cert. No. 33 for 1000 shares of capital stock of the Yakima Holding Corporation, of no par value.....	12,500.00
Cert. No. 1 for 1000 shares of capital stock of the Yakima Holding Corporation, of no par value.....	12,500.00
Cert. No. 34 for 1000 shares of capital stock of the Yakima Holding Corporation, of no par value.....	12,500.00
Cert. No. 631 for 288 shares of capital stock of the Yakima Holding Corporation, of no par value.....	3,600.00
Cert. No. 16 for 2 shares of capital stock of the Western Airlines Inc., of the par value of \$25.00 per share	None
Cert. No. 83 for 4 shares of capital stock of the Western Airlines Inc., of the par value of \$25 per share	None
Cert. No. 015281 for 4 shares of Preferred capital stock of the Washington Water Power Company, of the par value of \$100. per share.....	280.00
Cert. No. 1 for 5000 shares of Preferred capital stock of the Spindletop Western Oil Company, of the par value of \$1. per share.....	None
Cert. No. 13 for 178,800 shares of capital stock of the Daisy Mining & Milling Company, of the par value of \$1. per share.....	None
Cert. No. 1 for 50 shares of capital stock of Locke Hardware Company, of the par value of \$100. per share	None
Cert. No. 16 for 15 shares of capital stock of the Foster-Morgan Lumber Company, of the par value of \$100. per share.....	None

	Appraised Valuation
Cert. No. 6667 for 236.8125 shares of capital stock of the Yakima Holding Corporation, of no par value	2,960.15
Due from J. E. Bittner, Jr.....\$265.06	219.04
Due from W. H. Carver..... 386.00	386.00
Due from J. E. Drain & Co..... 13.35	13.35
Due from C. J. Lynch, M.D..... 464.50	464.50
Due from J. L. McDonald, M.R..... 16.80	16.80
Due from W. A. McLaughlin..... 96.80	96.80
Due from W. E. Parker..... 13.10	13.10
Due from Shropshire & Hull..... 13.30	13.30
Due from State Tax Commission	7.15
Jewelry	460.00
Electric range, vacuum cleaner, etc.....	140.00
Household furniture, and furnishings in residence.....	1,800.00
	[129]
Piano	20.00
Furniture, fixtures, tools and equipment used in connection with the A. E. Larson Building.....	4,000.00
Cash on deposit in Personal checking account in Yakima First National Bank as of June 7, 1934	76.65
Cash on deposit in Building checking account in Yakima First National Bank as of June 7, 1934	1,103.49
Partnership Finance Company.....	2,571.06

State of Washington,
County of Yakima—ss.

E. P. Hoffman, being first duly sworn, says:
That he is the Trust Officer of Yakima First
National Bank, executor of the above entitled es-
tate, and makes this verification for and on be-

half of said executor. That the foregoing inventory contains a true statement of all of the estate of A. E. Larson, deceased, which has come into his possession and knowledge, and particularly all moneys belonging to said estate, and all just claims of said estate against this affiant and against said executor, except the interest of A. E. Larson, deceased, in the partnership formerly composed of A. E. Larson and Grover C. Burrows, doing business as Burrows Motor Co., and inventory of which said partnership estate and interest has heretofore been filed in the above court.

E. P. HOFFMAN

Subscribed and sworn to before me this 26th day of October, 1934.

C. W. HALVERSON,

Notary Public in and for the State of Washington,
residing at Yakima.

We, the undersigned, duly appointed appraisers of the above entitled estate, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us, and that we appraised the same at the several sums set opposite each item thereof, in figures; and appraise the total of said estate as above set forth in the sum of \$2,190,872.66 which we find to be its fair value.

We further appraise the whole of said estate of the above named decedent, including the appraised value of the said partnership estate, in the sum of \$162,608.13, in the sum of \$2,353,480.79.

Witness our hands this 24th day of November,
1934.

ALEXANDER MILLER
GEO. H. BRADSHAW
LLOYD L. WIEHL [130]

PETITIONER'S EXHIBIT 8

In the Superior Court of the State of Washington
In and for Yakima County.

No. 8561

Filed 4-25-35

IN THE MATTER OF THE ESTATE
OF

A. E. LARSON, Deceased.

FINAL REPORT OF EXECUTOR: PETITION
FOR DISTRIBUTION OF ESTATE, AND
FOR DISCHARGE OF EXECUTOR

To the Honorable R. B. Milroy, Court Commissioner
of the above entitled court:

The report and petition of Yakima First National
Bank, executor of the Estate of A. E. Larson, de-
ceased, respectfully shows:

1.

That A. E. Larson died at Seattle, Washington,
on or about the 7th day of June, 1934, and that
decedent at the time of his death was a resident of
Yakima, Yakima County, Washington, and left an
estate consisting of real and personal property in
said county subject to administration.

2.

That the decedent left a will bearing date the 31st day of May, 1934, under which said will your petitioner was named executor and that on the 13th day of June, 1934, said will was duly admitted to probate and that your petitioner was appointed as executor thereunder and immediately qualified as such and has been since then and is now the duly appointed, qualified and acting executor of the estate of A. E. Larson deceased.

3.

That notice to creditors has been published in the matter of said estate as required by law and the order of this court. [131]

4.

That an inventory and appraisement of said estate has been duly made, returned and filed herein as required by law and the order of the court.

5.

That more than six months have expired since the date of the first publication of notice to creditors, to-wit: more than six months from the 20th day of June, 1934, and that all claims against said estate have been paid.

6.

That as executor your petitioner has received a total of \$796,650.64, as is more particularly shown by the record of receipts attached hereto and marked Exhibit "A" and made a part hereof by reference; and that your petitioner has expended the total

sum of \$717,986.66, as is more particularly shown by the record of disbursements attached hereto, marked Exhibit "B" and made a part hereof by reference.

7.

That all bequests and trusts provided by said will have been paid except \$45,000.00 of the \$50,000.00-bequest to the people of the city of Yakima for the improvement of the Yakima Public Library, and the full sum of \$40,000.00 to the people of Yakima County, State of Washington, to be used for the improvement of Painted Rocks Park, and that said amounts will be paid before hearing on this petition.

8.

That all expenses of administration have been paid except the sum of \$5.00 necessary for the filing of this final report, and the further sum that will be required for the publication of the notice of time and place of hearing this [132] report and petition; the balance of the fee of your petitioner and of its attorneys, which said fees have not been fixed.

9.

That notice has been given to the inheritance tax and escheat division of the State of Washington as required by law and that the sum of \$28,750.64 has been paid as inheritance tax, but no final receipt therefor has been issued and no complete adjustment has been made thereof; and that said estate is subject to a federal estate tax of which the sum of \$56,815.74 has been paid, and that a further sum

may be required, but no audit and adjustment has been made as yet with the collector of internal revenue.

10.

That a description of all property owned by said estate so far as your petitioner is able to ascertain is shown in the inventory and appraisement filed herein.

11.

That at the time of his death the decedent left surviving him his widow, Rose B. Larson, and that all the property described in the inventory and appraisement herein was community property, and that the following are the heirs, legatees and devisees named in the Will:

Rose B. Larson, wife of said deceased;
Claudia Tellett, sister of said deceased;
Gertrude Larson, sister of said deceased;
Ethel Stevenson, sister of said deceased;
Donald Arthur Larson, nephew of said deceased;
Ralph Olson, Jr., nephew of said deceased;
Barbara Olson, niece of said deceased;
Mrs. Leilah Nelson, niece of said deceased;
Margaret Stevenson, niece of said deceased;
Gertrude May Stevenson, niece of said deceased;
Grover Burrows;
R. M. Hardy,
W. H. McCullough,
E. M. Fisher,
Rotary Club of Yakima, Washington, [133]

Salvation Army, of Yakima, Washington,
City of Yakima, a municipal corporation, and
Yakima County, a municipal corporation.

12.

That your petitioner found it necessary to obtain counsel to handle the legal work in connection with the probating of the estate of said deceased, and did employ the firm of Rigg, Brown & Halverson to perform said legal services; that said attorneys have been paid the amount shown in Exhibit "B" as an advance on their fee, and that your petitioner has received the sum shown in Exhibit "B" as an advance on its fee, but the fee of your petitioner and its attorneys has not been fixed.

Wherefore, your petitioner prays that an order be entered as follows:

1. Fixing the time and place of hearing this final report, petition for distribution of estate, and petition for discharge of executor.

2. Approving and confirming the final report of the executor.

3. Fixing and authorizing the payment of executor's fee and executor's attorney's fee.

4. Distributing all of said estate as provided in said will.

5. Discharging your petitioner as executor of said estate at such time as said estate is finally closed and the remaining bequests are paid, the executor's fee and the executor's attorney's fee paid, and the receipt is obtained from the inheri-

tance tax and escheat division of the State Tax Commission of the State of Washington, and from the Bureau of Internal Revenue of the United States Treasury Department, showing the payment of inheritance and estate [134] taxes due.

6. For such other and further orders, judgments and decrees as may be proper, just or necessary in the premises.

RIGG, BROWN & HALVERSON
Attorneys for Petitioner.

State of Washington,
County of Yakima—ss.

E. P. Hoffman, being first duly sworn, on oath deposes and says: That he is the trust officer of Yakima First National Bank, petitioner above named, and makes this verification for and on its behalf, being authorized to do so; that he has read the within and foregoing Final Report of Executor, Petition for Distribution of Estate, and for Discharge of Executor, knows the contents thereof, and believes the same to be true.

E. P. HOFFMAN

Subscribed and sworn to before me this 19th day of April, 1935.

NAT U. BROWN

Notary Public in and for the
State of Washington, residing
at Yakima. [135]

PETITIONER'S EXHIBIT 9

In the Superior Court of the State of Washington,
in and for Yakima County.

No. 8561

In the Matter of the Estate of
A. E. LARSON, Deceased.

SUPPLEMENTAL REPORT

Comes now the Yakima First National Bank, executor of the above entitled estate and reports as follows, to-wit:

I.

That since the filing of its final report herein there has been received by it an aggregate of moneys as shown by Exhibit "A" attached hereto and made a part hereof by reference; and there has been expended by it the sum set out in Exhibit "B" attached hereto and made a part hereof by reference, leaving a balance on hand as shown by Exhibit "C" attached hereto and made a part hereof by reference.

II.

That attached hereto and marked Exhibit "D" is a detailed report of receipts and disbursements in the Larson building account.

RIGG, BROWN & HALVERSON
Attorneys for Executor

Filed June 25 '35. [142]

RECEIPTS

1934

June 14	Balance in personal checking account transferred to trust department	\$ 66.65
	Burrows Motor Company—salary.....	73.38
	A. E. Larson Bldg.—transfer of rentals.....	900.00
	Donnelly Hotel Company—June rent.....	1,600.00
	D. V. Morthland, Trustee—in full payment W. E. & Frances A. Lovell mortgage to A. E. Larson.....	3,737.57
	Leo S. Ross Construction Company—interest coupons due June 1, 1934 on \$32,000 7% bonds.....	1,120.00
June 29	Guaranty Trust Company—director's fees.....	20.00
	Sunshine Mining Company—May salary.....	200.00
	A. E. Larson Bldg.—transfer of rentals.....	2,300.00
	Washington Water Power Co.—dividend on 4 shares pref.	6.00
	Rent on house at Wapato for June \$20. less expense of pipe \$1.25.....	18.75
	Grandview Motor Company—June rent.....	40.00
July 2	Sunshine Mining Company—Dividend No. 30 @ 16¢ per share on 210,974 shares.....	33,755.84
	West Side National Bank—dividends on 50 shares.....	200.00
	Surety Finance Company—dividend on 900 shares.....	3,600.00
July 11	Sunshine Mining Company—balance on June salary.....	46.67
	Interest coupons due July 1st on Sub. Dist. No. 7 of Drg. Improvement Dist. No. 3, Yakima County on 22,000 par.....	715.00
	Interest coupons due July 1 on Sub. Dist B of Drg Dist. No. 18 on par \$1,000.....	30.00
July 17	Grandview Motor Company—July rent.....	40.00
	Rent from house at Wapato \$20.00 less 25¢ exchange.....	19.75
	Donnelly Hotel Company—July rent.....	1,600.00
July 18	A. E. Larson Bldg.—transfer of rentals.....	2,400.00
Aug. 1	Burrows Motor Company—rent for June, July, & August @ \$350.00 per month.....	1,050.00
	Burrows Motor Company—payment on principal \$6,184.54 and on interest \$823.39.....	7,007.93
Aug. 2	Sale of Sunshine Mining Company stock—15,000 shares sold at 5.82½.....	87,375.00

Aug. 3	Interest coupons due 10-1-33—Naches Court Apt. bonds \$12,000 par.....	360.00
Aug. 7	A. E. Larson Bldg.—transfer of rentals.....	500.00
Aug. 10	Donnelly Hotel Company—August rentals.....	1,600.00
Aug. 15	Grandview Motor Company—August rent.....	40.00
	A. E. Larson Bldg.—transfer of rentals.....	1,000.00
Aug. 24	A. E. Larson Bldg.—transfer of rentals.....	400.00
	Rent from house at Wapato \$20.00 less 25¢ exchange	19.75
	Interest on Ralph O. Olson, Jr. note to Aug 27 '34 @ 8%	24.00
Sept 1	Sale of Sunshine Mining Company stock—1,000 shares @ 6.90.....	6,900.00
	Sale of Sunshine Mining Co. stock—2,000 shares @ 6.90	13,800.00
Sept 2	Burrows Motor Company—rent for September.....	350.00
	Burrows Motor Company—Int. on \$75,000 @ 5½% for Aug.	343.75
Sept 7	Sale of Sunshine Mining Co. stock—1500 shares @ 6.90	10,350.00
Sept 10	A. E. Larson Bldg.—transfer of rentals.....	1,500.00
Sept 13	Donnelly Hotel Company—September rent.....	1,600.00
Sept 13	Sale of Sunshine Mining Co. stock—10,000 shares @ 6.90	69,000.00
Sept 14	Interest coupons due Sept. 10 on L.I.D. #395 on par of \$9500.00.....	570.00
	Bonds called for payment Sept. 10—L.I.D. #395, ten bonds Nos. 51 to 60 incl. @ \$500.00 each.....	5,000.00
	A. E. Larson Bldg.—transfer of rentals.....	1,000.00
Sept 15	Dividend—Washington Water Power Company on 4 shares	6.00
	Sale of Sunshine Mining Co. stock—1000 shares @ 6.90	6,900.00
		<hr/>
		\$269,186.04

Exhibit "A"

	Forward	269,186.04
Sept 18	Grandview Motor Company—September rent.....	40.00
Sept 26	Sale of Sunshine Mining Co. stock—5,000 sh. @ 6.90	34,500.00
Oct. 1	Dividend—Sunshine Mining Co.—#31 @ 16¢ per share on 180,474 shares.....	28,875.84
Oct. 2	Bond #40 of L.I.D. #386 called for payment 10-1-34	100.00
	Interest coupons on \$800.00 L. I. #. #386 @ 6%.....	48.00
Oct. 5	Burrows Motor Company—rent for October.....	350.00
	Burrows Motor Co.—Int. on \$75,000 @ 5½% for Sept.	343.75
Oct. 11	Donnelly Hotel Company—October rent.....	1,600.00
	Sale of Sunshine Mining Co. stock—5000 sh. @ 6.90	34,500.00
Oct. 24	Grandview Motor Company—October rent.....	40.00
	A. E. Larson Bldg.—transfer of rentals.....	1,500.00
	Interest coupon due 10-10-34 on L.I.D. #372 par \$7500	450.00
Oct. 6	A. E. Larson Bldg.—transfer of rentals.....	1,000.00
Nov. 3	Burrows Motor Company—rent for November.....	350.00
	Burrows Motor Company—Int on \$75,000 @ 5½% for Oct.	343.75
Nov. 7	Sale of Sunshine Mining Co. stock—22,000 sh. A 6.90	151,800.00
Nov. 10	Donnelly Hotel Company—rent for November.....	1,600.00
Nov. 15	Bond #18 of L. I. D. #374 called for payment 11-11-34 Par \$500.00 and one interest coupon due thereon \$30.00	530.00
Nov. 16	Sale of Sunshine Mining Co. stock—1500 sh. @ 6.90	10,350.00
Nov. 23	Sale of Sunshine Mining Co. stock—5000 sh. @ 6.90	34,500.00
	Sale of West Side Nat'l Bank stock—50 shares.....	7,250.00
	Grover Burrows—payment on principal, purchase of A. E. Larson's interest in Burrows Motor Com- pany	15,000.00
Nov. 24	Sale of Sunshine Mining Co. stock—5000 sh. @ 6.90	34,500.00
Nov. 26	A. E. Larson Bldg.—transfer of rentals.....	1,000.00

Nov. 27	Burrows Motor Company—check for partnership, finance company \$1,651.06 which check together with 184 shares of Yakima Co. Hort. Union stock par \$10 per share accepted at 50¢ on the dollar amounting to \$920.00—this amount together with check of \$1,651.06 covers total as shown by the appraisal \$2,571.06	1,651.06
	Fred D. Jones—balance of interest due 6-7-34 on real estate contract \$36.07 and interest on interest \$1.05—tot.	37.12
Nov. 30	Grandview Motor Company—rent for November.....	40.00
	Sale of Sunshine Mining Co. stock—5000 sh. @ 6.90	34,500.00
Dec. 1	Interest coupons due 1201034—Leo Ross Construction Co. bonds, par \$32,000 @ 7%.....	1,120.00
Dec. 5	Sale of Sunshine Mining Co. stock—5000 sh. @ 6.90	34,500.00
	Sale of Sunshine Mining Co. stock—1000 sh. @ 6.90	6,900.00
	Burrows Motor Company—rent for December.....	350.00
	Burrows Motor Company—Int. on \$60,000 @ 5½% for Nov.	327.75
Dec. 8	A. E. Larson Bldg.—transfer of rentals.....	1,000.00
Dec. 10	Donnelly Hotel Company—rent for December.....	1,600.00
Dec. 12	A. E. Larson Bldg.—transfer of rentals.....	1,500.00
Dec. 15	Burrows Motor Company—in full for Yakima Savings & Loan Assn. stock.....	187.92
Dec. 18	Burrows Motor Company—check for dividend on Yakima Co. Hort. Union stock, 184 shares @ 50¢	92.00
	Dividend—Washington Water Power Company on 4 shares	6.00
	Grandview Motor Company—December rent.....	40.00
Dec. 19	Bonds called for payment 12-15-34 of L.I.D. #422, nos. 51 to 59 incl @ \$500 ea—\$4500 plus interest coupons on \$11,500 par L.I.D. #422 due 12-15-34 \$690.—total	5,190.00
Dec. 27	Dividend—Washington Co-op Egg & Poultry Assn. on 117 sh. preferred @ 8¢ and 125 sh. common @ 8¢	19.36

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Jan. 2	Surety Finance Company—dividends on 900 shares.....	3,600.00
	Sunshine Mining Company—dividend #32 @ 20¢ on 125,974 sh.....	25,194.80
	Interest coupons due 1-1-35 Sub Dist B of Drg Imp Dist 18.....	30.00
	Bonds called for payment 1-1-35 Sub Dist B of Drg Impr Dist #18, bonds Nos. 24 50 28 incl @ \$200.00 each	1,000.00
		<hr/>
		748,643.39
		[137]
	Forward	748,643.39
Jan. 4	Burrows Motor Company—Int. on \$60,000 @ 5½% for Dec.	275.00
	Burrows Motor Company—Rent for January.....	350.00
Jan. 10	A. E. Larson Bldg.—transfer of rentals.....	2,000.00
Jan. 11	Donnelly Hotel Company—rent for January.....	1,600.00
Jan. 17	A. E. Larson Bldg.—transfer of rentals.....	1,500.00
Jan. 21	Grandview Motor Company—rent for January.....	40.00
Jan. 23	Liberty Savings & Loan Assn.—interest on stock....	33.44
Jan. 29	Dividend—Yakima Hardware Co. on 360 shares of stock	2,880.00
Feb. 1	Burrows Motor Company—Int. on \$60,000 @ 5½% for Jan.	275.00
	Burrows Motor Company—Rent for February.....	350.00
Feb. 9	Donnelly Hotel Company—Rent for February.....	1,600.00
	A. E. Larson Bldg.—transfer of rentals.....	2,500.00
Feb. 20	Grandview Motor Company—February rent.....	40.00
Feb. 25	A. E. Larson Bldg.—transfer of rentals.....	1,000.00
Feb. 27	Interest coupons due 1-23-35—L. I. D. #404 on par \$10,000 @ 6%.....	600.00
Mar. 4	Burrows Motor Company—Int. on \$60,000 @ 5½% for Feb.	275.00
	Burrows Motor Company—Rent for March.....	350.00
Mar. 11	Donnelly Hotel Company—rent for March.....	1,600.00

Mar. 13	E. A. Boatman—to pay one-half 1934 real estate taxes on property owned by Boatman & Larson.....	29.69
	Fred Chandler—to pay one-half 1934 real estate taxes on Benton County property owned by Larson & Chandler.....	1.32
Mar. 13	A. E. Larson Bldg.—transfer of rentals.....	2,500.00
Mar. 14	Yakima Rotary Bldg.—repayments of \$14.00 & \$20.00 on account of a student loan advanced by Mr. Larson	34.00
Mar. 16	Washington Water Power Co.—dividend on 4 shares	6.00
Mar. 24	A. E. Larson Bldg.—transfer of rentals.....	800.00
Apr. 1	Sunshine Mining Company—dividend #33 @ 20¢ per share on 125,974 shares.....	25,194.80
Apr. 1	Yakima Masonic Temple Assn.—dividend on 16 shares	8.00
Apr. 2	Burrows Motor Company—Int. on \$60,000 @ 5½% for March	275.00
	Burrows Motor Company—Rent for April.....	350.00
Apr. 10	Donnelly Hotel Company—Rent for April.....	1,600.00
Apr. 2	Grandview Motor Company—Rent for March.....	40.00
		<hr/>
		\$796,750.64
		[138]

RECEIPTS

(Continued)

	Forward	\$796,750.64
April 17	A. E. Larson Bldg.—transfer of rentals.....	4,000.00
27	Grandview Motor Company—Rent for April.....	40.00
May 1	Peter Sellen, Trustee—payment in full for Texwa Oil Company stock, \$500.00 subscription less \$53. expense	447.00
4	Burrows Motor Company—Rent for May.....	350.00

4	Burrows Motor Company—Int. on \$60,000 @ 5½% for April	275.00
	Burrows Motor Company—paid one-half for Aero Automatic Fire Alarm on Burrows Motor Company building	144.00
11	Western Airlines, Inc.—first payment on stock settlement	7.50
13	Donnelly Hotel Company—Rent for May.....	1,900.00
18	Grandview Motor Company—Rent for May.....	40.00
21	A. E. Larson Bldg.—transfer of rentals.....	2,400.00
June 1	Interest coupons due June 1st on \$32,000 per Leo S. Ross Construction Company bonds, 7%.....	1,120.00
5	Burrows Motor Company—Rent for June.....	350.00
	Burrows Motor Company—Int. on \$60,000 @ 5½% for May	275.00
11	Donnelly Hotel Company—Rent for June.....	1,900.00
17	R. W. Dent Insurance Agency, Inc.—return premium on policy No. 1099 Burrows Motor Company building \$358.15 and dividend on earned premium \$69.57—total	400.17
19	A. E Larson Building—Transfer of rentals.....	2,000.00
20	Grandview Motor Company—June Rent.....	40.00
21	Washington Water Power Company—dividend.....	6.00
		<hr/>
		\$812,445.31

Exhibit "A"

[144]

DISBURSEMENTS

June 14	Mrs. Rose B. Larson—by court order \$5000 and for monthly allowance \$1500.....	\$ 6,500.00
	Collector of Internal Revenue—second quarterly installment on 1935 income tax—Adelbert E. Larson \$327.32 and Rose B. Larson \$327.32.....	654.64
June 29	R. W. Dent Insurance Agency—premium on 3-yr fire insurance policy on Donnelly Hotel Building	1,404.32
June 30	Joe Douglas—Gardener for June.....	65.00
July 17	Mrs. Rose B. Larson—July allowance less advance to gardener, \$75.00.....	1,435.00

July 18	Yakima Hardware Company—claim filed for merchandise	17.52
	Joseph Yolo—claim filed for merchandise.....	17.50
	Dr. W. L. Ross—claim filed for professional services	1,200.00
	Miss Ida E. Metz—claim filed for professional services	27.00
	Drs. Nelson, Jacobsen & Ohman—claim for professional services	1,200.00
	Miss Hazel Rottler—claim for professional services	21.00
	Jean McCahren—claim for professional services.....	12.00
	City Cleaners & Laundry—for services.....	14.24
	Dorothy Henry, Inc.—claim for services & merchandise	50.75
	Swedish Hospital—claim for hospital fees and services	659.73
	St. Elizabeth's Hospital—hospital fees and services	117.45
	Olga Rod—professional services.....	23.25
	Yakima City Creamery—for merchandise.....	1.60
	City Meat Marker—for merchandise.....	3.20
	Pacific Power & Light Co.—electric and other services	23.57
July 19	Mrs. Rose B. Larson—to reimburse for following claims filed against estate and paid by her:	
	French Electric Dye Works.....	\$5.60
	Pacific Tel & Tel Company.....	5.05
	Cliftons'	4.95
	John Dower Lumber Company.....	5.04
	City of Yakima, Water Dept.....	3.05
		23.69
July 31	Barnes-Woodin Company—claim filed for merchandise	90.56
	Mrs. Rose B. Larson—to reimubrse for bill she paid Yakima Medical & Surgical Clinic.....	3.50
	Shirley D. Parker—salary for July, assisting in administration of estate.....	1,000.00
	W. P. Fuller & Company—one plate glass 28x62 in Donnelly	10.16
	F. F. Herring, City Treasurer—irrigation taxes on Lots 1 to 10 incl. Yakima Heights Residence tracts	46.96
	C. M. Holdren—repairs on Donnelly Hotel roof.....	35.00
	Annavee Flower Shop—claim for merchandise.....	14.32

		H. H. Bowen—merchandise ordered by Mrs. A. E. Larson	22.40
		W. P. Fuller & Co.—one plate glass 24x68 in Donnelly	9.56
		Shaw & Sons—copper casket, two ambulance trips to Seattle and completed burial services; & sealing crypt in mausoleum.....	1,780.00
Aug. 1		Northern Life Ins. Co.—1st annual premium on \$20,000 policy on life of Grover Burrows, five-year term	279.00
Aug. 2		Rigg, Brown & Halverson—services \$6.00 and publishing notice to creditors \$9.12—total.....	15.12
		Surety Finance Company—in payment of notes and interest as follows:	
		10-13-33 Note, principal (balance.....\$ 3,000.00	
		Int. 6% from 12-31-33	
		to 8-1-34	141.85
		11-25-33 Note, principal	12,500.00
		Int. 6% from 12-31-33	
		to 8-1-34	437.50
		12-22-33 Note, principal	2,000.00
		Int. 5¾% from date to 8-1-34	69.63
		1-2-34 Note, principal	2,000.00
		Int. 5¾% from date to 8-1-34	66.76
		1-12-34 Note, principal	8,000.00
		Int. 5¾% from date to 8-1-34	253.00
			<hr/>
			\$ 16,778.04
			[139]
		Forward	16,778.04
Aug. 2		2-13-34 Note, principal	\$ 5,000.00
		Int. 6% date to 8-1-34.....	139.17
		5-7-34 Note, principal (balance).....	9,500.00
		Int. 7% date to 8-1-34.....	157.21
		Additional interest to and including 8-1-34:	
		on 6% paper.....	3.41
		on 5¾% paper.....	1.92
		on 7% paper.....	1.85
			<hr/>
			\$43,272.30
			43,272.30

Aug. 2	Yakima First National Bank—in payment for the following notes and interest:		
	3-26-34 Note, principal	\$ 8,000.00	
	Int. @ 6% from date to 8-1-34	170.67	
	3-17-34 Note, principal	41,000.00	
	Int. @ 6% from date to 8-1-34	936.16	
		<hr/>	
		\$50,106.83	50,106.83
Aug. 10	Hull-Miller Company—bond of executor.....		260.00
Aug. 15	Mrs. Rose B. Larson—August allowance.....		1,500.00
	Ethel Stevenson—part payment of bequest.....		5,000.00
	Ethel Stevenson, Guardian for Margaret Stevenson, a minor—part payment of bequest.....		1,000.00
	Ethel Stevenson, Guardian for Gertrude May Stevenson, a minor,—part payment of bequest.....		1,000.00
	Claudia Tellett—part payment of bequest.....		5,000.00
	Gertrude Larson—Part payment of bequest.....		5,000.00
	Mrs. Logan Roberts, Guardian for Donald Arthur Larson—part payment of bequest.....		1,000.00
	Yakima First National Bank—full payment of assignment to bank, part payment of bequest to Ralph O. Olson, Jr.....		3,000.00
	Mrs. Leilah Nelson—part payment of bequest.....		1,000.00
	Miss Barbara Olson—part payment of bequest.....		1,000.00
Aug. 25	Seattle Title Company—Certificate of foreclosure on A. E. Howard property.....		10.00
Aug. 31	Shirley D. Parker—salary for August, assistant in administration of estate.....		1,000.00
Sept 14	Collector of Internal Revenue—third quarterly payment income tax for 1933—Adelbert E. Larson.....		327.32
	Collector of Internal Revenue—third quarterly payment income tax for 1933—Rose B. Larson.....		327.32
	Rose B. Larson—September allowance.....		1,500.00
Sept 18	Yakima First National Bank—telegram to Shirley Parker by Mr. Hardy and revenue stamps for transfer of Sunshine.....		2.26
Sept 27	John S. Maloney—claim for services.....		3,300.00

Sept 29	Shirley D. Parker—salary for September, assisting in administration of estate.....	1,000.00
27	Mrs. Rose B. Larson—advance.....	10,148.00
Oct. 9	General Insurance Co. of America—balance of first mortgage on Donnelly Hotel Bldg. \$20,000 and interest from 4-10-34 to 10-10-34 @ 5¾%.....	20,575.00
Oct. 11	Mrs. Rose B. Larson—October allowance.....	1,500.00
26	Riggs, Brown & Halverson—advanced for filing fees and sheriff's fees.....	7.90
Oct. 27	Sunnyside Land & Investment Co.—3 yr. renewal \$10,000 insurance on Grandview Bldg. expires 10-12-37	303.00
	Shirley D. Parker—salary for October, assisting in administration of estate.....	1,000.00
	Mrs. Rose B. Larson—November allowance.....	1,500.00
Nov. 13	Claudia Tellett—balance due on bequest less state tax at 3%.....	14,550.00
	Gertrude Larson—balance due on bequest less state tax at 3%.....	14,550.00
	Ethel Stevenson—balance due on bequest less state tax at 3%.....	14,550.00
		<hr/>
		\$221,067.97
	Forward	221,067.97
Nov. 13	Mrs. Logan Roberts, Guardian for Donald Arthur Larson—balance due on bequest less state tax 3%	8,700.00
	Mrs. Leilah Nelson—balance due on bequest less state tax at 3%.....	8,700.00
	Ethel Stevenson, Guardian for Margaret Stevenson—balance due on bequest less state tax at 3%.....	8,700.00
	Ethel Stevenson, Guardian for Gertrude May Stevenson—balance due on bequest less state tax at 3%	8,700.00
	R. M. Hardy—bequest less state tax at 10%.....	4,500.00
	W. H. McCullough—bequest less state tax at 10%	900.00
	E. M. Fisher—bequest less state tax at 10%.....	900.00

Nov. 14	Miss Barbara Olson—balance due on bequest less state tax at 3%.....	8,700.00
	Ralph Olson, Jr.—balance of bequest less \$300 note and interest from 8-27-34 to 11-15-34 \$5.27.....	6,394.73
Nov. 19	Mrs. Rose B. Larson—advance.....	8,500.00
	Rigg, Brown & Halverson—on account attorneys fee for handling estate.....	10,000.00
Nov. 27	Shirley D. Parker—salary for November.....	1,000.00
	Mrs. Rose B. Larson—allowance for December.....	1,500.00
	Collector of Internal Revenue—last quarter income tax for 1933—Adelbert E. Larson \$327.29 and Rose B. Larson \$327.29.....	654.58
Nov. 28	Lloyd L. Wiehl—services as appraiser.....	250.00
	Geo. H. Bradshaw—services as appraiser.....	250.00
Dec. 5	Yakima First National Bank—phone call 30¢ and recording fees and revenue stamps, filing fee, documentary stamps on Sunshine stock.....	41.47
Dec 17	Yakima First National Bank—Trust Department—transfer of funds to pay following bequests: Donald Arthur Larson \$9700; Rotary Club for Crippled Children Fund \$15000; Salvation Army \$30,000; Yakima County for T. B. Controll \$100,000; City of Yakima, Art Gallery & Museum \$100,000; total	254,700.00
Dec. 18	Mrs. Rose B. Larson—advance.....	2,500.00
	Mrs. Rose B. Larson—advance.....	5,291.00
Dec. 21	Rigg, Brown & Halverson—on account of attorneys fees	2,500.00
	Mrs. Rose B. Larson—advance.....	1,435.90
	Mrs. Rose B. Larson—advance.....	800.00
Dec. 24	Yakima First National Bank—on account executor's fees	5,000.00
Dec. 31	Shirley D. Parker—salary for December.....	1,000.00
	Mrs. Rose B. Larson—January allowance.....	1,500.00
	Federal tax on checks from 6-14-34 to 12-31-34.....	1.74

1935

Jan. 29—	Shirley D. Parker—salary for January.....	1,000.00
	Mrs. Rose B. Larson—allowance for February.....	1,500.00
Feb. 7	Mrs. Rose B. Larson—advance (Larson-Parker suite)	2,424.36
13	City Treasurer of Yakima, Wash—on account of bequest to public library.....	5,000.00
Feb. 15	Mrs. Rose B. Larson—advance.....	5,000.00
	Treasurer of the State of Washington—state tax on estate	28,750.64
	Collector of Internal Revenue—federal tax on estate	56,815.74
Feb. 19	Mrs. Rose B. Larson—advance.....	1,121.25
27	Mrs. Rose B. Larson—allowance for March.....	1,500.00
	Shirley D. Parker—salary for February.....	1,000.00
	Rigg, Brown & Halberson—phone calls to Miller at Sunnyside, 60¢; Certified copy of will \$1.00; Abstract Co., for certificate of ownership, McCredy property \$10.00	11.60
Mar. 9	Yakima County Treasurer—real estate taxes for 1934 on Burrows Motor Co. Bldg. Lots 27, 28, 29, 30, 31 & 32 in Block 9 Yakima County, \$1,249.63 less 3% rebate \$37.49.....	1,212.14
	Yakima County Treasurer—personal property tax for 1934 \$61.27 less 3% rebate \$1.84.....	59.43
	Yakima County Treas—1934 real estate tax on E 15 ft of Lot 10, Lot 11 & 12 in Block 31 (Larson Bldg.) \$8,635.32 less 3% rebate \$259.06.....	8,376.26
		<hr/>
		\$687,958.81
		[140]
	Forward	\$687,958.81
Mar. 9	Town Treasurer of Grandview—irrigation installment for 1935 on Lots 9, 10, 11 in Block 3, Grandview \$1.20 on Lots 7 & 8 in Block 18, Grandview—96¢ total	2.16
Mar. 13	Ralph S. Stacy, King County Treas.—to pay 1934 real estate taxes on Larson-Boarman property in full; TL 5 Gov Lot 3; TL 1, Gov Lot 1; TL 2, Gov Lot 2 TL 8, SE¼ of NW¼, Sec. 24, twp 20, Range 9 (½ paid by Boatman).....	59.38

Ben Knox, Benton County Treas.—1934 real estate tax on Benton County property, Larson-Chandler; NW SW less Ry. rtw; N½ of Lot 6 less Ry. rtw; SE SW less Ry. rtw; Sec. 6, twp 8, Range 28 (Chandler paid one-half) \$2.64 less rebate of 8¢		2.56
Yakima County Treasurer—1934 real estate taxes as follows on: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10 Yakima Heights Residence Tracts (home) paid one-half, no rebate.....		206.64
Yakima County Treasurer—1934 real estate taxes as follows on: Lots 25, 26, 27, 28 & 29 in Block 51 (Donnelly Hotel) \$3069.18 less 3% rebate \$92.08— \$2,977.10; On Lots 9, 10 & 11 in Block 3, Grandview (Garage Bldg) \$115.92 less 3% rebate \$3.48 and Drainage & Dike tax, \$1.26—total \$113.70; On Lots 7 & 8 in Block 18, Grandview (Store & Office Bldg.) \$218.90 less 3% rebate \$6.57 plus drainage 20¢ \$212.53—total.....		3,303.33
Ralph S. Stacy, King County Treas.—to pay 1934 real estate tax on Lots 29, 30, 31, 32, & 33 in Block 20, Lake Union Shore Lands, \$55.56 less 3% rebate \$1.67—\$53.89; also Lots 27, 28, 29, 30 & 31 in Block 37 Brooklyn Addition \$95.94 less 3% rebate \$2.88—\$93.06; also Lots 36, 37, 38, 39 & 40 in Block 37, Brooklyn Addition \$28.64 less 3% rebate 86¢—\$27.78; total.....		174.73
Mar. 29	Mrs. Rose B. Larson—allowance for April.....	1,500.00
	Shirley D. Parker—salary for March.....	1,000.00
Apr. 1	Mrs. Rose B. Larson—advance.....	20,000.00
	Burrows Motor Company—claim for cash advance made to Mrs. Larson on June 2, 1934.....	200.00
Apr. 3	Mrs. Rose B. Larson—advance.....	2,000.00
Apr. 11	Hull-Miller Company \$5000 insurance on household furniture & furnishings for 3 yrs at 1811 W. Yakima Ave.	25.00
Apr. 16	Mrs. Rose B. Larson—advance.....	1,554.05
		<hr/>
		\$717,986.66
		[141]

DISBURSEMENTS

(Continued)

			717,986.66
April 23	Mayo Clinic—balance in full, professional services	1,000.00	
	Ross Dent Insurance Agency, Inc.—Policy No. 4488		
	Hartford Steam Boiler, Donnelly Hotel, expires		
	9-27-37	15.07	
30	Mrs. Rose B. Larson—allowance for May.....	1,500.00	
	S. D. Parker—salary for April.....	1,000.00	
	F. H. Church—on account of fee for compiling in-		
	come tax returns.....	100.00	
May 3	Mrs. Rose B. Larson—advance.....	1,500.00	
4	American District Telegraph Co.—Aero automatic		
	fire alarm on Burrows Motor Company Bldg. from		
	2-1-35 to 1-31-36.....	288.00	
11	Mrs. Rose B. Larson—advance.....	5,000.00	
13	F. H. Church—on account of fee for compiling in-		
	come tax returns.....	200.00	
17	Hull-Miller Company—first year's premium on a		
	three year policy Public Liability at 19-27 So.		
	2nd St. covering building, all premises and ele-		
	vator	91.86	
	Rigg, Brown & Halverson—telegram 30¢ and filing		
	fee for final account \$5.00.....	5.30	
22	Ross Dent Insurance Agency, Inc.—additional		
	premium on policy \$4488, adding Burrows Motor		
	Company Bldg. boilers.....	32.81	
27	Collector of Internal Revenue—1934 income tax		
	return and interest, A. E. Larson Estate, (first		
	Quarter)	2,228.77	
	Collector of Internal Revenue—1934 income tax		
	return and interest, A. E. Larson (first quarter)	983.87	
29	Mrs. Rose B. Larson—allowance for June.....	1,500.00	
	S. D. Parker—salary for May.....	1,000.00	
	Mrs. Rose B. Larson—advance to pay first quarter		
	of income tax return and interest for 1934.....	808.56	

31	Donnelly Hotel Company—to reimburse for W. P. Fuller & Company bill, ribbed wire skylight, glazed	4.70
	Rigg, Brown & Halverson—publishing notice of hearing	11.40
June 3	Collector of Internal Revenue—additional federal estate tax	29,405.31
5	W. P. Fuller Company—one glazed plate glass for Burrows Motor Company Bldg \$27.50, tax 50¢, total	28.00
	Ross Dent Insurance Agency, Inc.—Policy No. P1751 on Larson Bldg. from 5-8-35 to 5-8-38, premium \$910. less return premium by cancelling and re-writing \$710.89 and earned premium dividend credit \$87.14—total credit \$789.03—balance.....	111.97
	Ross Dent Insurance Agency, Inc.—Policy No. P1753 on Burrows Motor Company Bldg. from 5-8-35 to 5-8-38 \$58.00.....	539.98
11	Collector of Internal Revenue—second quarter installment 1934 income tax return, A. E. Larson estate	2,201.98
	Collector of Internal Revenue—second quarterly installment 1934 income tax return, Adelbert E. Larson	972.11
	F. H. Church—balance due for compiling income tax returns	148.75
21	E. McWilliams—appraising Burrows Motor Company Bldg. for insurance.....	20.00
24	Rigg, Brown & Halverson—on account of attorneys' fee	10,000.00
	Yakima First National Bank—balance in full for executor's fee	10,000.00
	Yakima First National Bank—reimbursing for postage paid out on estate from June 14, 1934 to June 24, 1935.....	3.17
		<hr/>
		\$788,688.27

RECAPITULATION

Total receipts from June 14, 1934 to June 24, 1935.....	\$812,445.31	
Total disbursements from June 14, 1934 to June 24, 1935.....	\$788,688.27	
Plus balance on hand June 24, 1935.....	23,757.04	812,445.31

Exhibit "C"

[146]

State of Washington
County of Yakima—ss:

E. P. Hoffman, being first duly sworn, on oath deposes and says: That he is the trust officer of the Yakima First National Bank, executor above named, and makes this verification for and on its behalf, being authorized so to do; that he has read the within and foregoing Supplemental Report, knows the contents thereof and believes the same to be true.

E. P. HOFFMAN

Subscribed and sworn to before me this 25th day of June, 1935.

NAT U. BROWN

Notary Public in and for the State of Washington,
residing at Yakima. [143]

PETITIONER'S EXHIBIT 10

SN-IT-1

Treasury Department
Internal Revenue Service
Seattle, Washington
May 16, 1940

Office of
Internal Revenue Agent in Charge
Seattle Division
350 Federal Office Building
IT:90D:JW

Estate of A. E. Larson,
Shirley D. Parker,
Administrator de bonis non,
Larson Building,
Yakima, Washington.

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1934, discloses a deficiency of \$148,403.81 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may

file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle, Washington, for the attention of IT:90D:JW. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING

Commissioner

By GEORGE C. EARLEY

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver

JW:ecg [147]

STATEMENT

IT:90D:JW

Estate of A. E. Larson,
Shirley D. Parker, Administrator de bonis non,
Larson Building,
Yakima, Washington

Tax Liability for the Taxable Year Ended
December 31, 1934

Income Tax

Liability—\$157,211.74

Assessed—\$8,807.93

Deficiency—\$148,403.81

In making this determination of your income tax liability, careful consideration has been given to report of examination dated September 26, 1935, to protest dated November 9, 1935, and to statements made in conferences held December 20, 1935, July 22, 1938, November 28, 1939, December 21, 1938, November 28, 1939, January 10, 1940, and March 22, 1940.

If a petition to the United States Board of Tax Appeals is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice *with* be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

A copy of this letter and statement has been mailed to your representative, H. B. Jones, 610 Colman Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

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Adjustments to Net Income

Net income as disclosed by return.....	\$ 54,693.09
Unallowable deductions and additional income:	
(a) Profit on sale of Sunshine Mining Company stock.....	\$230,375.00
(b) Salary Business Agent.....	3,000.00
(c) Executor's Commissions	6,766.59
(d) Dividends	6,740.00
(e) Net rental income understated	2,423.93
(f) Capital gains understated and losses disallowed.....	19,905.85
	<hr/>
	269,211.37
Net income adjusted.....	<hr/> \$323,904.46

Explanation of Adjustments

(a) There is added to the taxable income shown in the return the amount of \$230,375.00, representing the taxable profit on 85,000 shares of Sunshine Mining Company stock sold by the executor during the period June 8 to December 31, 1934. The taxable profit is computed as follows:

Net selling price:

<u>Certificate Number</u>	<u>Shares</u>	<u>Per Share</u>	<u>Total Amount Received</u>
738	5,000	\$5.82½	\$ 29,125.00
1147	10,000	5.82½	58,250.00
601	10,000	6.90	69,000.00
633	10,000	6.90	69,000.00
654	5,000	6.90	34,500.00
736	5,000	6.90	34,500.00
739	5,000	6.90	34,500.00
1346	30,000	6.90	207,000.00
2822	5,000	6.90	34,500.00
	<hr/> 85,000		<hr/> \$570,375.00
Value at date of death—\$4.00 per share.....			340,000.00
Profit received—100% taxable.....			<hr/> \$230,375.00
			[149]

(b) It is held that \$3,000.00 represents reasonable compensation for the services of Mr. Shirley D. Parker for the taxable year 1934. Deducted \$6,000.00; disallowed \$3,000.00.

(c) Executor's commission or fee is chargeable against the corpus of the estate and is not deductible from income.

(d) Dividends from Surety Finance Company were understated in the amount of \$6,740.00.

(e) Net rental income was understated in the amount of \$2,423.03. In computing the net income from this source there was deducted \$1,611.88 as insurance premiums whereas the amount deductible and allocable to the taxable year amounted to

\$646.67; a difference of \$965.21, and the amount deductible as depreciation is held to be \$9,721.28 as against \$11,180.00 deducted; a difference of \$1,-458.72. Total disallowance \$2,423.83.

(f) On line 8 of the return there was deducted \$444.79 as a capital loss and on line 15 there was deducted \$18,837.64 as an ordinary loss. It is held that the losses claimed, totaling \$19,282.43 are not deductible but that capital gains totaling \$623.42 were realized. Income has accordingly, been increased \$19,905.85. Computation of gains is as follows:

Asset	Base	Selling Price	Profit	Percentage Taxable	Taxable
West Side National Bank.....	1/2	3,625.00	0	0	0
	1/2	3,625.00	625.00	40%	250.00
LID 386	1/2	50.00	0		0
	1/2	50.00	10.81	100%	10.81
LID 395	1/2	2,500.00	0		0
	1/2	2,263.18	236.82	100%	236.82
Wapato House & Lot.....	1/2	1,100.00	14.77	100%	14.77
	1/2	961.23	138.77	80%	111.02
Total.....					\$623.42

Get correct amount of rental income from depreciation adjustment.

[150]

Computation of Tax

Net income adjusted.....	\$323,904.46
Less:	
Personal exemption	1,000.00
	<hr/>
Balance (surtax net income).....	\$322,904.46
Less:	
Dividends	70,047.29
	<hr/>
Net income subject to normal tax.....	\$252,857.17
Normal tax at 4% on \$252,857.17.....	\$ 10,114.29
Surtax on \$322,904.46.....	147,097.45
	<hr/>
Corrected income tax liability.....	\$157,211.74
Income tax assessed:	
Original, Account No. 6-200038.....	8,807.93
	<hr/>
Deficiency of income tax.....	\$148,403.81

[151]

District of Washington

Form 870

Treasury Department

Internal Revenue Service

Revised April 1939

IT:90D:JW

11674-W

Waiver of Restrictions on Assessment and
Collection of Deficiency in Tax

Pursuant to the provisions of section 272 (d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the

restrictions provided in section 272 (a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

Taxable year ended 12/31/1934

Income tax in the sum of \$148,403.81

Estate of A. E. Larson
Shirley D. Parker,
Administrator de bonis non
Yakima, Washington

Date.....1940 By..... [152]

TREASURY DEPARTMENT

Bureau of Internal Revenue
Pacific Division, Technical Staff
1215 Smith Tower Building
Seattle, Wash.

Office of
Commissioner of Internal Revenue

Address Reply to
Head, Pacific Division,
Technical Staff
And Refer To

C-TS:PD

S:CRM

June 1, 1940

Mrs. Rose B. Larson,
Larson, Building,
Yakima, Washington

Madam:

There is enclosed for your information a copy of
a letter addressed to your authorized representative,
Mr. H. B. Jones, Sr., Colman Building, Seattle,
Washington.

Respectfully,
VIRGIL BEAN,
Head, Pacific Division,
Technical Staff.

Enclosure:

Copy of letter [153]

June 1, 1940

C-TS:PD

S:CRM

Mr. H. B. Jones, Sr.,
Colman Building
Seattle, Washington

In re: Mrs. Rose B. Larson,
Yakima, Washington,
Income Tax

Docket No: 88813

Year: 1933 and 1934

Sir:

Reference is made to the petition for redetermination of the deficiency now pending before the United States Board of Tax Appeals in the above-entitled case and to conference held in the office of the Pacific Division of the Technical Staff at Seattle, Washington, on March 22, 1940.

Your proposal of settlement has been given careful consideration, but is deemed unacceptable. Accordingly, the case has been referred to Division Counsel for trial before the United States Board of Tax Appeals.

A copy of this letter is being forwarded to the above-named petitioner.

Respectfully,

VIRGIL BEAN,

Head, Pacific Division,
Technical Staff.

CRM:alm [154]

Office of
Commissioner of Internal Revenue

Address Reply to	Treasury Department
Head, Pacific Division,	Bureau of Internal
Technical Staff	Revenue
and Refer to	Pacific Division,
C-TS:PD	Technical Staff
S:CRM	1215 Smith Tower
	Building
	Seattle, Wash.

June 1, 1940

Estate of Adelbert E. Larson, Deceased,
Shirley D. Parker, Administrator de bonis non,
Larson Building,
Yakima, Washington

Sir:

There is enclosed for your information a copy of a letter addressed to your authorized representative, Mr. H. B. Jones, Sr., Colman Building, Seattle, Washington.

Respectfully,
VIRGIL BEAN,
Head, Pacific Division,
Technical Staff.

Enclosure:

Copy of letter. [155]

C-TS:PD

June 1, 1940

S:CRM

Mr. H. B. Jones, Sr.,
Colman Building,
Seattle, Washington.

In re: Estate of Adelbert E. Larson,
Yakima, Washington

Docket No: 88814

Taxable year ended December 31, 1933 and
period January 1 to June 7, 1934

Sir:

Reference is made to the petition for redetermination of the deficiency now pending before the United States Board of Tax Appeals in the above-entitled case and to conference held in the office of the Pacific Division of the Technical Staff at Seattle, Washington, on March 22, 1940.

Your proposal of settlement has been given careful consideration, but is deemed unacceptable; Accordingly, the case has been referred to Division Counsel for trial before the United States Board of Tax Appeals.

A copy of this letter is being forwarded to the above-named petitioner.

Respectfully,

VIRGIL BEAN,

Head, Pacific Division,

Technical Staff.

CRM:alm [156]

PETITIONER'S EXHIBIT 11

Called meeting of the Board of Trustees of the Sunshine Mining Company met in the office of the Company, June 2nd, 1934 at 2 P. M.

Messrs Alex Miller, C. M. Hull and I. H. Dills present, a quorum present: Vice President Miller presiding, R. B. Kenyon, Secretary present and acting as such.

Mr. Miller stated that this meeting was called for the reason that due to Mr. Hull leaving for the east this afternoon and the necessity to have a quorum of the Board present for dividend declaration this call is made in conformity with understanding of meeting of May 31st, 1934: And Mr. Miller then called the meeting to order.

Mr. Hull moved the following resolution:

Resolved: That the stock records of the Company be closed to transfer at 5 P. M., June 12th, 1934 and that a dividend of 16¢ per share be paid to all stockholders of record at the close of business June 12th, 1934, said dividend to be payable June 26th, 1934. The transfer books to be re-opened for transfer June 27th, 1934, that the declaration date of this dividend be June 5th, 1934:

Mr. Dills seconded the motion, which was moved unanimously carried and so ordered.

No further business appearing, Mr. Dills moved, Mr. Hull seconded a motion to adjourn subject to

call, moved, carried and so ordered.

/s/ ALEX MILLER,

Vice President.

Attest /s/ R. B. KENYON,

Secretary.

I, Frank M. Hardy, Assistant Secretary, Sunshine Mining Company certify that this is a true and correct copy of the meeting of the Board of Trustees of the Sunshine Mining Company of June 2nd, 1934.

(Seal)

FRANK M. HARDY,

Assistant Secretary. [157]

SCHEDULE A—INCOME (OR LOSS) FROM BUSINESS OR PROFESSION (See Instruction 2)

Total receipts from business or profession (state kind of business) Cash or Goods Sold		0		0		0	
Labor		0		0		0	
Materials and supplies		0		0		0	
Merchandise bought for sale		0		0		0	
Other costs (State below or on separate sheet)		0		0		0	
Plus inventory at beginning of year		0		0		0	
TOTAL (Lines 3 to 6)		0		0		0	
Less inventory at end of year		0		0		0	
Net Cash or Goods Sold (Line 7 minus Line 8)		0		0		0	
Enter "C", or "C or M", on Lines 9 and 10 to indicate whether income is valued at cost, or cost or market, whichever is lower.		0		0		0	
Explanation of deductions claimed on Lines 9 and 10		0		0		0	

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. Kind or Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Wherein Greater	4. Depreciation (Specify in table at foot of page)	5. Rentals	6. Gross Receipts (Specify below)	7. Net Profit (Enter on Line 9)
0	0	0	0	0	0	0

Explanation of deductions claimed in Column 6.

SCHEDULE C—CAPITAL GAINS AND LOSSES (See Instruction 8)

1. Description of Property	2. Date Acquired	3. Date Sold or Disposed	4. Amount Received	5. Cost or Basis as of March 1, 1913, Wherein Greater	6. Cost or Basis as of March 1, 1913, Wherein Greater	7. Depreciation Allowed (See Instructions 8 and 9)	8. Gain or Loss	9. Proceeds or (Loss) on Sale or Disposition	10. Gain or Loss on Sale or Disposition
0	0	0	0	0	0	0	0	0	0

TOTAL GAINS AND LOSSES (Enter net gain or loss on Item 8) (Capital losses are allowable only to the extent of \$2,000 plus capital gains) \$ 0

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. Description of Securities	2. Amount Owed	3. Interest Received or Accrued	4. Principal Amount Received from Taxation	5. Amount Owed or Received	6. Interest or Amount in Excess of Redemption (Enter on Item 1)
Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions.	0	0	0	0	0
Obligations issued under Federal Farm Loan Act, or under such Act as amended.	0	0	0	0	0
Forty 3½% Bonds and other obligations of United States issued on or before September 1, 1917.	0	0	0	0	0
Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.	0	0	0	0	0
Forty 4% and 4½% Bonds and Treasury Bonds.	0	0	0	0	0
Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above).	0	0	0	0	0

SCHEDULE E—INCOME FROM DIVIDENDS

Enter all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends.

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

1. 1917	100.00	1. 1917	345.00	1. 1917	100.00
2. 1918	100.00	2. 1918	345.00	2. 1918	100.00
3. 1919	100.00	3. 1919	345.00	3. 1919	100.00
4. 1920	100.00	4. 1920	345.00	4. 1920	100.00



Schedule "A"

A. E. Larson and Rose B. Larson
SUMMARY OF COMMUNITY INCOME
January 1, 1934 to June 7, 1934

	Total	A. E. Larson $\frac{1}{2}$	Rose B. Larson $\frac{1}{2}$
Partnership—Burrows Motor Co.....	4807.99	2404.00	2403.99
Interest—Taxable Sheet No. 1.....	6144.92	3072.46	3072.46
Salaries Sheet No. 1.....	1540.05	770.03	770.02
Interest—Non-taxable Sheet No. 1.....	1589.99	794.99	795.00
Dividends Sheet No. 2.....	63668.87	31834.44	31834.43
Income from Rentals Sheet No. 2.....	(2757.29)	(1378.64)	(1378.65)
Bad Debts Recovered Sheet No. 2.....	10.23	5.16	5.16
	<hr/> 75004.85	<hr/> 37502.44	<hr/> 37502.41

	Total	A. E. Larson 1/2	Rose B. Larson 1/2
Deductions to June 7, 1934			
Taxes—Personal Property			
Real Estate	62.54		
Benton County	409.20		
King County	1.48		
Yakima Heights	38.01		
	46.96		
	145.00	(172.50)	(172.50)
Donations			
Red Cross	100.00		
Crippled Childrens' Fund	100.00		
Congregational Church			
Business Expense	145.00	(279.10)	(279.09)
Chamber of Commerce			
Legal—W. E. Parker	20.00	(20.00)	(10.00)
	645.13	(322.57)	(322.56)
Interest			
Surety Finance Co. to 6/7/1934	870.19		
Yakima First National Bank to 6/7/34	657.65		
	1527.84	(763.92)	(763.92)
		(1527.84)	(763.92)
		(3096.16)	(1548.07)
			[160]

Sheet #1

A. E. Larson and Rose B. Larson

COMMUNITY INCOME JAN. 1, 1934 TO JUNE 7, 1934, INCLUDING INCOME ACCRUED
IN ESTATE TAX RETURN

	A. E. Larson 1/2	Rose B. Larson 1/2
Partnership Income		
Burrows Motor Co.—Profit.....	4807.99	2403.99
Interest		
Naches Court Bonds.....		360.00
Burrows Motor Co.....		5297.93
Taxable Interest Accrued in Estate Return.....		
Lovell Mortgage.....		387.57
Ross Cons. Co. Bonds.....		43.55
Ralph Olson.....		19.80
Fred D. Jones.....		36.07
	6144.92	3072.46
	6144.92	3072.46

	Total	A. E. Larson 1/2	Rose B. Larson 1/2
Salaries			
Sunshine Mining Co.....	1000.00		
Sunshine Mining Co.—Accrued.....	46.67		
Burrows Motor Co.....	400.00		
Burrows Motor Co.—Accrued.....	73.38		
Guaranty Trust Co.—Fees.....	20.00		
	<hr/>		
	1540.05	770.03	770.02
Non-Taxable Interest Accrued in Estate Return			
Imp. Dist. No. 7.....	633.64		
L.I.D. #395 Bonds.....	422.75		
L.I.D. #386 Bonds.....	32.93		
L.I.D. #372 Bonds.....	153.75		
L.I.D. #374 Bonds.....	17.25		
L.I.D. #422 Bonds.....	329.67		
	<hr/>		
	1589.99	794.99	795.00
			[161]

Sheet #2

A. E. Larson and Rose B. Larson

COMMUNITY INCOME JAN, 1, 1934 TO JUNE 7, 1934

		A. E. Larson 1/2	Rose B. Larson 1/2
	Total		
Dividends Received per A. E. Larson Records			
Jan. 1934—Yakima Hardware Co.....	1440.00		
Feb. 1934—Masonic Temple Assn.....	12.00		
Mch. 1934—Wash. Water Power Co.....	6.00		
Mch. 1934—Sunshine Mining Co.....	33755.84		
Apr. 1934—General Insurance Co.....	6.48		
	<hr/>		
	35220.32		
Accrued in Estate Return			
Sunshine Mining Co.....	25129.46		
West Side Natl. Bank.....	174.47		
Surety Finance Co.....	3140.00		
Washington Water Power Co.....	4.62		
	<hr/>		
	63668.87	31834.44	31834.43

	Total	A. E. Larson 1/2	Rose B. Larson 1/2
Bad Debt Recovered			
Old Grandview Warrant Collected	10.32	5.16	5.16
Income from Rentals per Schedules Attached			
O. A. Finch—Wapato—Loss	(6.28)		
Donnelly Hotel Bldg. Profit	961.21		
Grandview Motor Co.—Loss	(2.13)		
Grandview Building—Loss	(409.48)		
A. E. Larson Bldg.—Loss	(3300.61)		
Loss	(2757.29)	(1378.64)	(1378.65)
	<u>75004.85</u>	<u>37502.44</u>	<u>37502.41</u>
			[162]

A. E. Larson and Rose B. Larson

COMMUNITY INCOME JAN 1, 1934 TO JUNE 7, 1934

RENTAL INCOME INCLUDING ACCRUED RENT SHOWN IN ESTATE TAX RETURN

	A. E. Larson 1/2	Rose B. Larson 1/2
	Total	
Wapato Building Income		
Rent Received	100.00	
Rent Accrued	4.67	
	104.67	
Deductions		
Repairs	3.80	
Taxes	67.90	
Depreciation		
5% on 1800.00 for 5 mos. 7 days	39.25	
	110.95	
Loss	(6.28)	(3.14)
Donnelly Hotel Building Income		
Rent Received	8000.00	
Rent Accrued to June 7, 1934	373.34	
	8373.34	

	Total	A. E. Larson 1/2	Rose B. Larson 1/2
Deductions			
Insurance	196.78		
Insurance Accrued in Estate Return	1404.32		
Repairs	5.90		
Taxes	3038.92		
Depreciation			
Cost 125000.00 at 3% for 5 mos. 7 days	1614.60		
Interest Accrued in Estate Tax Return	185.29		
Interest Paid—A. E. Larson Record	966.32		
	<u>7412.13</u>		
Profit	961.21	480.61	480.60
Grandview Motor Co.			
Income—Rent Received	200.00		
Rent Accrued to June 7, 1934	9.34		
	<u>209.34</u>		
Deductions			
Taxes	106.81		
Depreciation			
Cost 6000.00 at 4% for 5 mos. 7 days	104.66		
	<u>211.47</u>		
Loss	(2.13)	(1.06)	(1.07)

PETITIONERS EXHIBIT 13

In the Superior Court of the State of Washington
in and for Yakima County.

(In Probate)

No. 8561

In the Matter of the Estate of

A. E. LARSON,

Deceased.

PETITION FOR FAMILY ALLOWANCE

Comes now Rose B. Larson, surviving widow of
A. E. Larson, deceased, and respectfully represents
to the court:

1.

That said decedent died on the 7th day of June,
1934, and that at the time of his death he was a
resident of Yakima County, State of Washington.

2.

That the Yakima First National Bank was ap-
pointed executor under the will of the decedent on
the 13th day of June, 1934, and has qualified and
entered upon the discharge of its duties as such
executor.

3.

That no inventory and appraisement has yet been
made, but that the value of said estate, consisting
of the community property of the decedent and your
petitioner, is approximately \$1,500,000.00.

4.

That it is necessary that your petitioner have an
allowance for her support and maintenance, and

that \$5000.00, cash, and the further sum of \$1500.00 a month, payable monthly, is a reasonable, proper and necessary amount to maintain and support the petitioner and the [164] family residence of the decedent and your petitioner in the manner to which she has been accustomed;

Wherefore, your petitioner prays that she be allowed the sum of \$5000.00 cash, and the further sum of \$1500.00 a month from the date of the death of said decedent, to-wit, from the 7th day of June, 1934, for her support and maintenance and the maintenance of her home, until the further order of the court.

ROSE B. LARSON,
Petitioner.

State of Washington,
County of Yakima—ss.

Rose B. Larson, being first duly sworn, on oath deposes and says: That she is the petitioner above named; that she has read the within and foregoing Petition for Family Allowance, knows the contents thereof, and believes the same to be true.

ROSE B. LARSON.

Subscribed and sworn to before me this 14th day of June, 1934.

NAT U. BROWN,
Notary Public in and for the State of Washington,
residing at Yakima.

Filed: 6-14-34. [165]

[Title of Superior Court and Cause.]

ORDER FOR FAMILY ALLOWANCE

This matter coming on to be heard upon the petition of Rose B. Larson, surviving widow of decedent, for family allowance, the said petitioner and Yakima First National Bank, executor, both being represented by Rigg, Brown & Halverson, and the court having heard the evidence and being fully advised, it is

Ordered that said executor be and it is hereby authorized and directed to pay to the said petitioner the sum of \$5000.00, cash, and the further sum of \$1500.00, and to pay the sum of \$1500.00, monthly, on the 7th day of each and every month hereafter until the further order of this court for the support and maintenance of said petitioner and for the maintenance of the family residence of petitioner.

Dated this 14th day of June, 1934.

R. B. MILROY,

Court Commissioner [166]

PETITIONER'S EXHIBIT 14

CLAIMS AGAINST A. E. LARSON ESTATE

Burrows Motor Co.....	Filed 4/ 4/1935	200.00
John W. Maloney.....		3,300.00
John W. Maloney.....		5,275.00
Burrows Motor Co.....	12/ 7/1934	200.00
“	8/ 1/1934	200.00
Yakima First National Bank	8/ 2/1934	50,106.83
Surety Finance Co.....	8/ 3/1934	43,272.30
Shaw and Sons, Funeral Home	7/31/1934	1,780.00
W. P. Fuller Co.....		9.56
Annavee Flower Shop.....		14.32
H. H. Bowen.....	7/30/1934	22.40
Yakima Medical & Surgical Clinic	7/30/1934	3.50
Barnes-Woodin Co.	7/30/1934	90.56
Yakima City Creamery.....	7/19/1934	1.60
City Meat Market.....	7/17/1934	3.20
City of Yakima Water Dept.	7/17/1934	3.05
John Dower Lumber Co.....	7/17/1934	5.04
Yakima Hardware Co.....	7/17/1934	17.52
Joseph Yolo	7/17/1934	17.50
Pacific Power & Light Co.....	7/17/1934	23.57
Clifton's	7/17/1934	4.95
The Swedish Hospital.....	7/17/1934	659.73
St. Elizabeth's Hospital.....	7/17/1934	117.45
R. W. Dent Insurance Agency	7/17/1934	1,146.60
“	7/17/1934	1,404.32
Olga Rod	7/17/1934	23.25
Hazel E. Rottles.....	7/17/1934	21.00
French Electric Dye Works..	7/17/1934	5.60
Pacific Telephone & Tele- graph Co.	7/17/1934	5.05
Jean McCakren	7/17/1934	12.00
City Cleaners & Laundry.....	7/17/1934	14.24
Dorothy Henry Inc.....	7/17/1934	50.75
Drs. Nelson Jacobsen and Okman	6/27/1934	1,200.00
Ida E. Metz.....	6/25/1934	27.00
Dr. W. L. Ross, Jr.....	6/25/1934	1,200.00
Parker & Rucker, Attorneys..	6/22/1934	57.49
“	6/22/1934	645.13
Mayo Clinic	12/18/1934	1,000.00

RESPONDENT'S EXHIBIT A

June 30, 1934

Yakima First National Bank

Yakima, Washington

Gentlemen:

The undersigned, Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, and Grande, Stolle & Company, a corporation, hand you herewith option agreement dated June 30, 1934, given by said executor in favor of Grande, Stolle & Company, a corporation, together with certificate Nos. 739 and 654, representing 10,000 shares of the capital stock of the Sunshine Mining Company, which certificates are endorsed in blank, and said parties hereby instruct you as follows:

1. The purchase price of said stock is the sum of \$7.00 as set forth in the attached agreement, less a brokerage of 10¢ per share which brokerage the undersigned executor agrees may be deducted from the purchase price as set forth in said attached agreement, making the net amount which you are authorized to receive in full payment from said Grande, Stolle & Company of \$6.90 per share.

2. You are further instructed that upon the payment to you of the purchase price hereinabove set forth, less brokerage, by the Grande, Stolle & Company, a corporation, you are instructed to deliver all or such portion of said deposited stock as may be paid for by said Grande, Stolle & Company, and

you are further authorized that in the event said Grande, Stolle & Company desires to purchase less than the full amount of said stock so deposited, to have said stock transferred upon the books of the Sunshine Mining Company into certificates of such denomination as may be required by said Grande, Stolle & Company, the expense of such transfer to be borne by them.

3. You are further instructed that you are not to allow such stock, or any portion thereof, above described to be withdrawn by said Grande, Stolle & Company unless said company shall fully pay for the same. [168]

You are further instructed that all stock in your possession after the expiration of four months from the date of completion of the listing of the Sunshine Mining Company stock on the New York Curb Exchange or in your possession on the 31st day of December, 1934, at the hour of five o'clock p. m., whichever date occurs first, is to be delivered by you to the undersigned executor.

By E. P. HOFFMAN,

Its Trust Officer,

As the duly appointed, qualified and acting Executor of the Estate of A. E. Larson, deceased.

GRANDE, STOLLE & CO.

By CARL M. STOLLE,

Its Vice-Pres.

The undersigned acknowledges receipt of the above letter and enclosures therein stated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By F. V. GLAETZNER,
Asst. Cashier. [169]

OPTION AGREEMENT

For and in consideration of the sum of One and No/100 Dollars (\$1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase 10,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

This option shall continue in force and effect from the date hereof until four months after the listing of the stock of Sunshine Mining Company on the New York Curb Exchange and in no event beyond the 31st day of December, 1934, at 5:00 o'clock p. m., and on said date, whichever occurs first, this said option and all rights hereunder shall terminate.

The said undersigned does further agree to deposit said stock, to-wit, 10,000 shares, in escrow with the Yakima First National Bank of Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said eecrow to be borne by Grande, Stolle & Company, a corporation.

It is understood that during the life of this said option the undersigned agrees that it will not sell or dispose of any of its stock now owned in the Sunshine Mining Company, a corporation, except that during the life of this said option [170] said undersigned may sell not to exceed one thousand (1000) shares of its said stock, provided that said Grande, Stolle & Company, a corporation, shall have the first right of refusal of said stock, should the undersigned elect to sell said one thousand shares, or any part thereof.

It is understood that this option is subject to the said Grande, Stolle & Company, a corporation, appointing an engineer, receiving said engineer's report on said Sunshine Mining Company's properties and completing the listing of the stock of said Sunshine Mining Company upon the New York Curb Exchange, and this option shall become null and void and of no force and effect in the event the appointment of said engineer, his report and the

listing of said stock upon the New York Curb Exchange shall not be completed on or before the first day of September, 1934.

It is understood that in the event said engineer is appointed, his report made, and said listing completed on or before the first day of September, 1934, then in that event this option shall continue in full force and effect for a period of four months from the date of listing said stock on the New York Curb Exchange and not later than the 31st day of December, 1934, at the hour of 5 o'clock p. m., whichever date occurs first and thereafter this agreement shall be null and void.

Dated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By E. P. HOFFMAN

Trust Officer,

Executor of the Estate of A.
E. Larson, deceased.

Accepted this 30th day of June, 1934.

GRANDE, STOLLE &
COMPANY, a corporation

By CARL M. STOLLE

Vice President. [171]

CERTIFICATE

State of Washington,
County of Yakima—ss:

I, Walter J. Funk, Liquidating Agent of the Yakima First National Bank, do hereby certify that the attached and foregoing Option Agreement, dated June 30th, 1934, between Yakima First National Bank, as Executor of the Estate of A. E. Larson, deceased, and Grande, Stolle & Company, a Washington corporation, for 10,000 shares of the capital stock of the Sunshine Mining Company, together with letter under the same date from Yakima First National Bank, Executor of the Estate of A. E. Larson, deceased, to the Yakima First National Bank, are true and complete copies of the originals thereof, which are in possession of and were surrendered to the undersigned as such Liquidating Agent, and are a part of the permanent records and files of the Yakima First National Bank now in possession of the undersigned Liquidating Agent.

Dated at Yakima, Washington, this 8th day of November, 1940.

(Seal)

WALTER J. FUNK

Liquidating Agent of the
Yakima First National Bank.

[172]

June 30, 1934

Yakima First National Bank

Yakima, Washington

Gentlemen:

The undersigned, Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, and Grande, Stolle & Company, a corporation, hand you herewith option agreement dated June 30, 1934, given by said executor in favor of Grande, Stolle & Company, a corporation, together with certificate No. 633, representing 10,000 shares of the capital stock of the Sunshine Mining Company, which certificate is endorsed in blank, and said parties hereby instruct you as follows:

1. The purchase price of said stock is the sum of \$7.00 as set forth in the attached agreement, less a brokerage of 10¢ per share which brokerage the undersigned executor agrees may be deducted from the purchase price as set forth in said attached agreement, making the net amount which you are authorized to receive in full payment from said Grande, Stolle & Company of \$6.90 per share.

2. You are further instructed that upon the payment to you of the purchase price hereinabove set forth, less brokerage, by the Grande, Stolle & Company, a corporation, you are instructed to deliver all or such portion of said deposited stock as may be paid for by said Grande, Stolle & Company, and you are further authorized that in the event said Grande, Stolle & Company desires to purchase less

than the full amount of said stock so deposited, to have said stock transferred upon the books of the Sunshine Mining Company into certificates of such denomination as may be required by said Grande, Stolle & Company, the expense of such transfer to be borne by them.

3. You are further instructed that you are not to allow such stock, or any portion thereof, above described to be withdrawn by said Grande, Stolle & Company unless said company shall fully pay for the same. [173]

You are further instructed that all stock in your possession after the expiration of four months from the date of completion of the listing of the Sunshine Mining Company stock on the New York Curb Exchange or in your possession on the 31st day of December, 1934, at the hour of five o'clock p. m., whichever date occurs first, is to be delivered by you to the undersigned executor.

YAKIMA FIRST NATIONAL BANK

By E. P. HOFFMAN

Its Trust Officer

As the duly appointed, qualified and acting Executor of the Estate of A. E. Larson, deceased.

GRANDE, STOLLE & CO.

By CARL M. STOLLE

Its Vice-Pres.

The undersigned acknowledges receipt of the above letter and enclosures therein stated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL BANK

By F. V. GLAETZNER

Asst. Cashier [174]

OPTION AGREEMENT

For and in consideration of the sum of One and No/100 Dollars (\$.100) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase 10,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

This option shall continue in force and effect from the date hereof until four months after the listing of the stock of Sunshine Mining Company on the New York Curb Exchange and in no event beyond the 31st day of December, 1934, at 5:00 o'clock p. m., and on said date, whichever occurs first, this said option and all rights hereunder shall terminate.

The said undersigned does further agree to deposit said stock, to-wit, 10,000 shares, in escrow with the Yakima First National Bank of Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.

It is understood that during the life of this said

option the undersigned agrees that it will not sell or dispose of any of its stock now owned in the Sunshine Mining Company, a corporation, except that during the life of this said option [175] said undersigned may sell not to exceed one thousand (1000) shares of its said stock, provided that said Grande, Stolle & Company, a corporation, shall have the first right of refusal of said stock, should the undersigned elect to sell said one thousand shares, or any part thereof.

It is understood that this option is subject to the said Grande, Stolle & Company, a corporation, appointing an engineer, receiving said engineer's report on said Sunshine Mining Company's properties and completing the listing of the stock of said Sunshine Mining Company upon the New York Curb Exchange, and this option shall become null and void and of no force and effect in the event the appointment of said engineer, his report and the listing of said stock upon the New York Curb Exchange shall not be completed on or before the first day of September, 1934.

It is understood that in the event said engineer is appointed, his report made, and said listing completed on or before the first day of September, 1934, then in that event this option shall continue in full force and effect for a period of four months from the date of listing said stock on the New York Curb Exchange and not later than the 31st day of December, 1934, at the hour of 5 o'clock p. m., whichever

date occurs first and thereafter this agreement shall be null and void.

Dated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL BANK

By E. P. HOFFMAN

Trust Officer

Executor of the Estate of A. E.
Larson, deceased.

Accepted this 30th day of June, 1934.

GRANDE, STOLLE & COMPANY,
a corporation,

By CARL M. STOLLE, V. P. [176]

CERTIFICATE

State of Washington,
County of Yakima—ss:

I, Walter J. Funk, Liquidating Agent of the Yakima First National Bank, do hereby certify that the attached and foregoing Option Agreement, dated June 30th, 1934, between Yakima First National Bank, as Executor of the Estate of A. E. Larson, deceased, and Grande, Stolle & Company, a Washington corporation, for 10,000 shares of the capital stock of the Sunshine Mining Company, together with letter under the same date from Yakima First National Bank, Executor of the Estate of A. E. Larson, deceased, to the Yakima First National Bank, are true and complete copies of the originals thereof, which are in possession of and

were surrendered to the undersigned as such Liquidating Agent, and are a part of the permanent records and files of the Yakima First National Bank now in possession of the undersigned Liquidating Agent.

Dated at Yakima, Washington, this 8th day of November, 1940.

WALTER J. FUNK

Liquidating Agent of the
Yakima First National Bank.

[177]

June 30, 1934

Yakima First National Bank
Yakima, Washington

Gentlemen:

The undersigned, Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, and Grande, Stolle & Company, a corporation, hand you herewith option agreement dated June 30, 1934, given by said executor in favor of Grande, Stolle & Company, a corporation, together with certificate No. 601, representing 10,000 shares of the capital stock of the Sunshine Mining Company, which certificate is endorsed in blank, and said parties hereby instruct you as follows:

1. The purchase price of said stock is the sum of \$7.00 as set forth in the attached agreement, less a brokerage of 10¢ per share which brokerage the

undersigned executor agrees may be deducted from the purchase price as set forth in said attached agreement, making the net amount which you are authorized to receive in full payment from said Grande, Stolle & Company of \$6.90 per share.

2. You are further instructed that upon the payment to you of the purchase price hereinabove set forth, less brokerage, by the Grande, Stolle & Company, a corporation, you are instructed to deliver all or such portion of said deposited stock as may be paid for by said Grande, Stolle & Company, and you are further authorized that in the event said Grande, Stolle & Company desires to purchase less than the full amount of said stock so deposited, to have said stock transferred upon the books of the Sunshine Mining Company into certificates of such denomination as may be required by said Grande, Stolle & Company, the expense of such transfer to be borne by them.

3. You are further instructed that you are not to allow such stock, or any portion thereof, above described to be withdrawn by said Grande, Stolle & Company unless said company shall fully pay for the same. [178]

4. You are further instructed that all stock in your possession after the expiration of four months from the date of completion of the listing of the Sunshine Mining Company stock on the New York Curb Exchange or in your possession on the 31st day of December, 1934, at the hour of five o'clock

p.m., whichever date occurs first, is to be delivered by you to the undersigned executor.

**YAKIMA FIRST NATIONAL
BANK**

By: E. P. HOFFMAN

Its Trust Officer

As the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased.

GRANDE, STOLLE & CO.

By: CARL M. STOLLE

Its Vice-Pres.

The undersigned acknowledges receipt of the above letter and enclosures therein stated this 30th day of June, 1934.

**YAKIMA FIRST NATIONAL
BANK**

By F. V. GLAETZNER

Asst. Cashier [179]

OPTION AGREEMENT

For and in consideration of the sum of One and No/100 Dollars (\$1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande,

Stolle & Company, a corporation, an option and right to purchase 10,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

This option shall continue in force and effect from the date hereof until four months after the listing of the stock of Sunshine Mining Company on the New York Curb Exchange and in no event beyond the 31st day of December, 1934, at 5:00 o'clock p.m., and on said date, whichever occurs first, this said option and all rights hereunder shall terminate.

The said undersigned does further agree to deposit said stock, to-wit, 10,000 shares, in escrow with the Yakima First National Bank of Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.

It is understood that during the life of this said option the undersigned agrees that it will not sell or dispose of any of its stock now owned in the Sunshine Mining Company, a corporation, except that during the life of this said option [180] said undersigned may sell not to exceed one thousand (1000) shares of its said stock, provided that said Grande, Stolle & Company, a corporation, shall have the first right of refusal of said stock, should the

undersigned elect to sell said one thousand shares, or any part thereof.

It is understood that this option is subject to the said Grande, Stolle & Company, a corporation, appointing an engineer, receiving said engineer's report on said Sunshine Mining Company's property and completing the listing of the stock of said Sunshine Mining Company upon the New York Curb Exchange, and this option shall become null and void and of no force and effect in the event the appointment of said engineer, his report and the listing of said stock upon the New York Curb Exchange shall not be completed on or before the first day of September, 1934.

It is understood that in the event said engineer is appointed, his report made, and said listing completed on or before the first day of September, 1934, then in that event this option shall continue in full force and effect for a period of four months from the date of listing said stock on the New York Curb Exchange and not later than the 31st day of December, 1934, at the hour of 5 o'clock p.m., whichever date occurs first and thereafter this agreement shall be null and void.

Dated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By E. P. HOFFMAN

Trust Officer

Executor of the estate of A. E.
Larson, deceased.

Accepted this 30th day of June, 1934.

GRANDE, STOLLE & COMPANY, a corporation.

By CARL M. STOLLE, V. P. [181]

CERTIFICATE

State of Washington,
County of Yakima—ss.

I, Walter J. Funk, Liquidating Agent of the Yakima First National Bank, do hereby certify that the attached and foregoing Option Agreement, dated June 30th, 1934, between Yakima First National Bank, as Executor of the Estate of A. E. Larson, deceased, and Grande, Stolle & Company, a Washington corporation, for 10,000 shares of the capital stock of the Sunshine Mining Company, together with letter under the same date from Yakima First National Bank, Executor of the Estate of A. E. Larson, deceased, to the Yakima First National Bank, are true and complete copies of the originals thereof, which are in possession of and were surrendered to the undersigned as such Liquidating Agent, and are a part of the permanent records and files of the Yakima First National Bank now in possession of the undersigned Liquidating Agent.

Dated at Yakima, Washington, this 8th day of November, 1940.

WALTER J. FUNK
Liquidating Agent of the Yakima
First National Bank. [182]

June 30, 1934

Yakima First National Bank
Yakima, Washington

Gentlemen:

The undersigned, Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, and Grande, Stolle & Company, a corporation, hand you herewith option agreement dated June 30, 1934, given by said executor in favor of Grande, Stolle & Company, a corporation, together with certificate Nos. 736 and 2822, representing 10,000 shares of the capital stock of the Sunshine Mining Company, which certificates are endorsed in blank, and said parties hereby instruct you as follows:

1. The purchase price of said stock is the sum of \$7.00 as set forth in the attached agreement, less a brokerage of 10¢ per share which brokerage the undersigned executor agrees may be deducted from the purchase price as set forth in said attached agreement, making the net amount which you are authorized to receive in full payment from said Grande, Stolle & Company of \$6.90 per share.

2. You are further instructed that upon the payment to you of the purchase price hereinabove set forth, less brokerage, by the Grande, Stolle & Company, a corporation, you are instructed to deliver all or such portion of said deposited stock as may be paid for by said Grande, Stolle & Company,

and you are further authorized that in the event said Grande, Stolle & Company desires to purchase less than the full amount of said stock so deposited, to have said stock transferred upon the books of the Sunshine Mining Company into certificates of such denomination as may be required by said Grande, Stolle & Company, the expense of such transfer to be borne by them.

3. You are further instructed that you are not to allow such stock, or any portion thereof, above described to be withdrawn by said Grande, Stolle & Company unless said company shall fully pay for the same. [183]

You are further instructed that all stock in your possession after the expiration of four months from the date of completion of the listing of the Sunshine Mining Company stock on the New York Curb Exchange or in your possession on the 31st day of December, 1934, at the hour of five o'clock p.m., whichever date occurs first, is to be delivered by you to the undersigned executor.

YAKIMA FIRST NATIONAL
BANK

By E. P. HOFFMAN

Its Trust Officer as the duly
appointed, qualified and acting
Executor of the Estate of A.
E. Larson, deceased.

GRANDE, STOLLE & CO.

By: CARL M. STOLLE

Its Vice-Pres.

The undersigned acknowledges receipt of the above letter and enclosures therein stated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By F. V. GLAETZNER

Asst. Cashier [184]

OPTION AGREEMENT

For and in consideration of the sum of One and No./100 Dollars (\$1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase 10,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

This option shall continue in force and effect from the date hereof until four months after the listing of the stock of Sunshine Mining Company on the New York Curb Exchange and in no event beyond the 31st day of December, 1934, at 5:00 o'clock p.m., and on said date, whichever occurs first, this said option and all rights hereunder shall terminate.

The said undersigned does further agree to deposit said stock, to-wit, 10,000 shares, in escrow with

the Yakima First National Bank of Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.

It is understood that during the life of this said option the undersigned agrees that it will not sell or dispose of any of its stock now owned in the Sunshine Mining Company, a corporation, except that during the life of this said option said undersigned may sell not to exceed one thousand (1000)

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shares of its said stock, provided that said Grande, Stolle & Company, a corporation, shall have the first right of refusal of said stock, should the undersigned elect to sell said one thousand shares, or any part thereof.

It is understood that this option is subject to the said Grande, Stolle & Company, a corporation, appointing an engineer, receiving said engineer's report on said Sunshine Mining Company's properties and completing the listing of the stock of said Sunshine Mining Company upon the New York Curb Exchange, and this option shall become null and void and of no force and effect in the event the appointment of said engineer, his report and the listing of said stock upon the New York Curb Ex-

change shall not be completed on or before the first day of September, 1934.

It is understood that in the event said engineer is appointed, his report made, and said listing completed on or before the first day of September, 1934, then in that event this option shall continue in full force and effect for a period of four months from the date of listing said stock on the New York Curb Exchange and not later than the 31st day of December, 1934, at the hour of 5 o'clock p.m., whichever date occurs first and thereafter this agreement shall be null and void.

Dated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By E. P. HOFFMAN

Trust Officer

Executor of the Estate of A. E.
Larson, deceased.

Accepted this 30th day of June, 1934.

GRANDE, STOLLE &
COMPANY,

a corporation.

By CARL M. STOLLE V. P. [186]

CERTIFICATE

State of Washington

County of Yakima—ss.

I, Walter J. Funk, Liquidating Agent of the Yakima First National Bank, do hereby certify that the attached and foregoing Option Agreement, dated June 30th, 1934, between Yakima First National Bank, as Executor of the Estate of A. E. Larson, deceased, and Grande, Stolle & Company, a Washington corporation, for 10,000 shares of the capital stock of the Sunshine Mining Company, together with letter under the same date from Yakima First National Bank, Executor of the Estate of A. E. Larson, deceased, to the Yakima First National Bank, are true and complete copies of the originals thereof, which are in possession of and were surrendered to the undersigned as such Liquidating Agent, and are a part of the permanent records and files of the Yakima First National Bank now in possession of the undersigned Liquidating Agent.

Dated at Yakima, Washington, this 8th day of November, 1940.

WALTER J. FUNK

Liquidating Agent of the Yakima First National Bank.

[187]

June 30th, 1934

Yakima First National Bank

Yakima, Washington

Gentlemen:

The undersigned, Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, and Grande, Stolle & Company, a corporation, hand you herewith option agreement dated June 30, 1934, given by said executor in favor of Grande, Stolle & Company, a corporation, together with certificate No. 1346, representing 30,000 shares of the capital stock of the Sunshine Mining Company, which certificate is endorsed in blank, and said parties hereby instruct you as follows:

1. The purchase price of said stock is the sum of \$7.00 as set forth in the attached agreement, less a brokerage of 10¢ per share which brokerage the undersigned executor agrees may be deducted from the purchase price as set forth in said attached agreement, making the net amount which you are authorized to receive in full payment from said Grande, Stolle & Company of \$6.90 per share.

2. You are further instructed that upon the payment to you of the purchase price hereinabove set forth, less brokerage, by the Grande, Stolle & Company, a corporation, you are instructed to deliver all or such portion of said deposited stock as may be paid for by said Grande, Stolle & Company, and you are further authorized that in the event said

Grande, Stolle & Company desires to purchase less than the full amount of said stock so deposited, to have said stock transferred upon the books of the Sunshine Mining Company into certificates of such denomination as may be required by said Grande, Stolle & Company, the expense of such transfer to be borne by them.

3. You are further instructed that you are not to allow such stock, or any portion thereof, above described to be withdrawn by said Grande, Stolle & Company unless said company shall fully pay for the same. [188]

4. You are further instructed that all stock in your possession after the expiration of four months from the date of completion of the listing of the Sunshine Mining Company stock on the New York Curb Exchange or in your possession on the 31st day of December, 1934, at the hour of five o'clock p.m., whichever date occurs first, is to be delivered by you to the undersigned executor.

YAKIMA FIRST NATIONAL
BANK

By E. P. HOFFMAN

Its Trust Officer

As the duly appointed, qualified
and acting executor of the es-
tate of A. E. Larson, de-
ceased.

GRANDE, STOLLE & CO.

By: CARL M. STOLLE

Its Vice-Pres.

The undersigned acknowledges receipt of the above letter and enclosures therein stated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By F. V. GLAETZNER
Asst. Cashier [189]

OPTION AGREEMENT

For and in consideration of the sum of One and No/100 Dollars (\$1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase 30,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

This option shall continue in force and effect from the date hereof until four months after the listing of the stock of Sunshine Mining Company on the New York Curb Exchange and in no event beyond the 31st day of December, 1934, at 5:00 o'clock p.m., and on said date, whichever occurs first, this said option and all rights hereunder shall terminate.

The said undersigned does further agree to deposit said stock, to-wit, 30,000 shares, in escrow with

the Yakima First National Bank of Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.

It is understood that during the life of this said option the undersigned agrees that it will not sell
[190]

or dispose of any of its stock now owned in the Sunshine Mining Company, a corporation, except that during the life of this said option said undersigned may sell not to exceed one thousand (1000) shares of its said stock, provided that said Grande, Stolle & Company, a corporation, shall have the first right of refusal of said stock, should the undersigned elect to sell said one thousand shares, or any part thereof.

It is understood that this option is subject to the said Grande, Stolle & Company, a corporation, appointing an engineer, receiving said engineer's report on said Sunshine Mining Company's property and completing the listing of the stock of said Sunshine Mining Company upon the New York Curb Exchange, and this option shall become null and void and of no force and effect in the event the appointment of said engineer, his report and the listing of said stock upon the New York Curb Exchange shall not be completed on or before the first day of September, 1934.

It is further understood that in the event said engineer is appointed, his report made, and said listing completed on or before the first day of September, 1934, then in that event this option shall continue in full force and effect for a period of four months from the date of listing said stock on the New York Curb Exchange and not later than the 31st day of December, 1934, at the hour of 5 o'clock p.m., whichever date occurs first and thereafter this agreement shall be null and void.

Dated this 30th day of June, 1934.

YAKIMA FIRST NATIONAL
BANK

By E. P. HOFFMAN

Trust Officer

Executor of the Estate of A. E.
Larson, deceased.

Accepted this 30th day of June, 1934.

GRANDE, STOLLE &
COMPANY,

a corporation.

By CARL M. STOLLE V. P. [191]

CERTIFICATE

State of Washington

County of Yakima—ss.

I, Walter J. Funk, Liquidating Agent of the Yakima First National Bank, do hereby certify that the attached and foregoing Option Agreement, dated June 30th, 1934, between Yakima First National Bank, as Executor of the Estate of A. E. Larson, deceased, and Grande, Stolle & Company, a Washington corporation, for 30,000 shares of the capital stock of the Sunshine Mining Company, together with letter under the same date from Yakima First National Bank, Executor of the Estate of A. E. Larson, deceased, to the Yakima First National Bank, are true and complete copies of the originals thereof, which are in possession of and were surrendered to the undersigned as such Liquidating Agent, and are a part of the permanent records and files of the Yakima First National Bank now in possession of the undersigned Liquidating Agent.

Dated at Yakima, Washington, this 8th day of November, 1940.

WALTER J. FUNK

Liquidating Agent of the Yakima First National Bank.

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RESPONDENT'S EXHIBIT B

Filed 2/27/35

In the Superior Court of the State of Washington,
In and for Yakima County.

No. 8561

In the Matter of the Estate of A. E. LARSON,
Deceased.

PETITION TO SELL PERSONAL PROPERTY

Comes now the Yakima First National Bank,
and respectfully shows to the Court as follows,
to-wit

1.

That it is the duly appointed, qualified and acting executor of the above entitled estate.

2.

That no inventory has yet been filed herein, but that included amongst the assets of said estate are 210,974 shares of stock of the Sunshine Mining Company.

3.

That your petitioner has received an offer from Grande, Stolle & Company, a corporation, for the purchase of 10,000 shares of said stock at a net return to said estate of $\$5.82\frac{1}{2}\%$ per share, payment to be made therefor as follows, to-wit: \$2.00 per share on or before the 1st day of September, 1934, and the balance of said purchase price, to-wit, $\$3.82\frac{1}{2}$ on or before the 15th day of December,

1934. And in connection therewith and as a part of said offer the said Grande, Stolle & Company desires to have an option for the purchase of 70,000 additional shares of said stock at the price to net the estate \$6.90 per share, said option to be taken up not later than the 31st day of December, 1934. [193]

4.

That while said stock has not yet been appraised your petitioner believes that said offer is a fair and reasonable one for said stock and that it is to the best interest of said estate that said offer be accepted and said option be granted, and that your petitioner be authorized to make and execute the necessary papers to carry out said agreement.

5.

That it is necessary that same part of the personal property of said estate be sold to pay the specific bequests provided in the will herein, and that your petitioner believes that said offer of the Grande, Stolle & Company is the best offer that could be received for a portion of said stock in the Sunshine Mining Company;

Wherefore, your petitioner prays for an order authorizing your petitioner to enter into such necessary contracts and agreements as to carry said offer into effect and ratifying and approving all steps that your petitioner has heretofore taken pursuant thereto.

RIGG, BROWN & HALVERSON
Attorneys for Petitioner

State of Washington,
County of Yakima—ss.

E. P. Hoffman, being first duly sworn, on oath deposes and says: That he is the trust officer of Yakima First National Bank, Petitioner above named, and makes this verification for and on its behalf, being authorized so to do; that he has read the within and foregoing Petition to Sell Personal Property, knows the contents thereof and believes the same to be true.

E. P. HOFFMAN

Subscribed and sworn to before me this 26th day
of July, 1934.

NAT U. BROWN

Notary Public for Washington,
residing at Yakima therein.

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RESPONDENT'S EXHIBIT C

In the Superior Court of the State of Washington,
In and for Yakima County.

No. 8561

In the Matter of the Estate of A. E. LARSON,
Deceased.

ORDER AUTHORIZING SALE OF PERSONAL
PROPERTY

This matter coming on to be heard upon the petition of the Yakima First National Bank as executor herein for authority to sell 10,000 shares of the capital stock of the Sunshine Mining Company to Grande, Stolle & Company to net the estate \$5.82½ and to grant to the said Grande, Stolle & Company an option to purchase 70,000 additional shares of said capital stock to net the said estate \$6.90, the executor being represented by its counsel, Rigg, Brown & Halverson, and Rose Larson, the surviving widow and residuary legatee, being represented by her agent, Shirley Parker, and the court having heard the evidence of R. M. Hardy and Alex Miller and being fully advised in the premises;

Now therefore, it is ordered that the executor be and it is hereby authorized to carry out such agreement of sale to said Grande, Stolle & Company as outlined in said petition; and it is further

Ordered that all acts of said executor heretofore

done in connection therewith are hereby fully and completely ratified and approved.

Dated this 26th day of July, 1934

R. B. MILROY

Court Commissioner [195]

RESPONDENT'S EXHIBIT D

LAST WILL AND TESTAMENT OF A. E. LARSON

In the name of God, amen, I, A. E. Larson of the City of Yakima, in the County of Yakima, State of Washington, of the age of 71 years, and being of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person, whatsoever, do make, publish and declare this my Last Will and Testament, in the manner following, that is to say:

First: I direct that my body be cared for as my wife wishes.

Second: I direct that my executor, hereinafter named, as soon as sufficient funds are available, pay my just debts and taxes.

Third: I give, bequeath and devise to each of my three sisters, viz Claudia Tellett, Gertrude Larson, and Ethel Stevenson, if living at the time of my death, the sum of Twenty Thousand Dollars, to have and to hold the same and their heirs forever.

Fourth: I give, bequeath and devise to each one of my nephews and neices, viz Donald Arthur Lar-

son, Ralph Olson, Jr., Barbara Olson, Mrs. Leilah Nelson, Margaret Stevenson, Gertrude May Stevenson, if living at the time of my death, the sum of Ten Thousand Dollars, to have and to hold the same and their heirs forever.

Fifth: I give, bequeath and devise to my nephew Donald Arthur Larson, if living at the time of my death, an additional sum to Paragraph 4, of Ten Thousand Dollars, to be held in trust by the Yakima First National Bank, until he becomes thirty years of age. The income from said sum to be paid to him annually.

Sixth: I give, bequeath and devise to Grover Burrows, the sum of Ten Thousand Dollars, to have and to hold the same and his heirs forever, in appreciation of a kind, faithful friend and a long-time and efficient business partner.

Seventh: I give, bequeath and devise to R. M. Hardy, if living at the time of my death, the sum of Five Thousand Dollars, in appreciation of sincere friendship and honest business relations.

Eighth: I give, bequeath and devise to W. H. McCullough, if living at the time of my death, the sum of One Thousand Dollars, in appreciation of a loyal friend and employee.

Ninth: I give, bequeath and devise to E. M. Fisher, if living at the time of my death, the sum of One Thousand Dollars, in appreciation of true friendship and efficient and pleasant business relations. [196]

Tenth: I give, bequeath and devise to the Rotary Club of Yakima, Washington, the sum of Fifteen Thousand Dollars, to be used in its crippled childrens Activity, said sum to be held in trust by the Yakima First National Bank and the income from same, together with \$500.00 of the principal, to be paid to said Rotary Club annually.

Eleventh: I give, bequeath and devise to the Salvation Army, the sum of Thirty Thousand Dollars, to be used in their local relief work in the City of Yakima, said sum to be held in trust by the Yakima First National Bank and the income from same, together with \$500.00 of the principal, to be paid to the Salvation Army annually.

Twelfth: I give, bequeath and devise to the people of the City of Yakima the sum of Fifty Thousand Dollars to be used for the improvement of the Yakima Public Library.

Thirteenth: I give, bequeath and devise to the people of Yakima County, State of Washington, the sum of One Hundred Thousand Dollars, to be used under the direction of the Board of County Commissioners of Yakima County for the control and prevention of tuberculosis, said sum to be held in trust by the Yakima First National Bank, and the income from same, together with \$2500.00 of the principal to be paid to the County of Yakima annually.

Fourteenth: I give, bequeath and devise to the people of Yakima County, State of Washington, the sum of Forty Thousand Dollars, to be used for the

improvement of Painted Rocks Park, which was *gratitously* deed to Yakima County by the Northern Pacific Railway Company.

Fifteenth: I give, bequeath and devise to my beloved wife, Rose B. Larson, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, Yakima Heights Acre Tracts, for her home during her lifetime. After her demise I give, bequeath and devise this property to the City of Yakima, Washington, forever, for the purpose of a public Art Gallery and Museum, to be maintained as such forever by the City of Yakima. To assist in such maintenance, I give, bequeath and devise to the City of Yakima, as a permanent endowment fund the sum of One Hundred Thousand Dollars, which sum is to be held in trust by the Yakima First National Bank and the income from same, to be paid to the City of Yakima annually and used as aforestated.

Sixteenth: I give, bequeath and devise to my beloved wife, Rose B. Larson, all the rest and residue of my estate, real, personal and mixed and all effects of every name and nature of which I may die seized or possessed, or which I shall have any interest in at the time of my decease, to hand and to hold the same to her and her heirs, forever.

Seventeenth: The executor of my estate shall have three years if necessary to liquidate enough property to pay all of the above bequests.

Lastly: I hereby nominate and appoint the Yakima First National Bank, of Yakima, Washington, the executor of my Last Will and Testament, and

hereby revoke all former wills made by me. [197]

In witness whereof, I have hereunto set my hand and seal this 31st day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty Four.

A. E. LARSON (Seal)

The foregoing instrument, consisting of two pages besides this, was, at the date hereof, by the said A. E. Larson, signed and sealed and published as, and declared to be, his Last Will and Testament in the presence of us, who at his request, and in his presence, and the presence of each other, have subscribed our names as witnesses hereto.

GORDON CORWIN,

of Yakima, Washington

ALTA ADDINGTON,

of Yakima, Washington

L. R. RIGHTMIRE,

of Yakima, Washington [198]

RESPONDENT'S EXHIBIT F

In the Superior Court of the State of Washington
In and for Yakima County.

No.

In the Matter of the Estate of A. E. LARSON,
Deceased.

PETITION FOR APPOINTMENT OF ADMIN-
ISTRATOR DE BONIS NON WITH THE
WILL ANNEXED.

To the Honorable Court Commissioner of the above
entitled Court:

The petition of Rose B. Larson respectfully shows

1.

That A. E. Larson died on or about the 7th day
of June, 1934, at Seattle, King County, Washington.

2.

That said deceased at the time of his death was
a resident of Yakima, Yakima County, Washington,
and left an estate consisting of real and personal
property in said county.

3.

That said deceased left a will bearing date the
31st day of May, 1934, which said will has hereto-
fore been duly admitted to probate. That Yakima
First National Bank, a corporation, named as ex-
ecutor in said will, duly qualified as such and from

the time of its appointment and qualification has duly administered said estate. The said executor has filed in this court an account of all its acts in relation to the administration of said estate and has tendered its resignation as such executor to this court, asking that its account be approved and that all of said estate be distributed except 15,000 shares of stock of Sunshine Mining Company, a corporation. Said executor has further asked that it be discharged from further responsibility under said trust and that its sureties be discharged from further liability on its bond. [199]

4.

That said estate is not in a condition to be closed as appears by the final and supplemental reports of Yakima First National Bank, a corporation, executor above referred to, and it is necessary that some fit and proper person be appointed to continue the administration of said estate as administrator de bonis non with the will annexed.

5.

That your petitioner is the surviving spouse and residuary legatee of said estate.

6.

That Shirley D. Parker is a resident of Yakima, Washington, and is a son of this petitioner. That he is duly qualified by law to act as administrator de bonis non with the will annexed, and is a fit and

proper person to be appointed as said administrator de bonis non with the will annexed.

Wherefore, your petitioner prays that Shirley D. Parker, of Yakima, Washington, be appointed administrator de bonis non with the will annexed of the within estate, and that the court fix the amount of his bond as such, and for such other and further order as to the court shall seem just in the premises.

ROSE B. LARSON

Petitioner [200]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of the United States Board of Tax
Appeals:

Please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner on review herein:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition and notice of deficiency, together with statement attached thereto.
 - (b) Answer.
 - (c) Amended petition.
 - (d) Answer to amended petition.
 - (e) Reply.
3. Board's opinion promulgated July 24, 1941.
4. Board's decision entered November 13, 1941.
5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
6. Statement of evidence, together with exhibits attached, and Stipulation of Facts.
7. All orders of enlargement of time for the preparation of the evidence and for the transmission and delivery of the record. [not included in record] [201]
8. Statement of Points to be relied upon.
9. This Designation.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within Designation is hereby admitted and agreed to this 31 day of March, 1942.

H. B. JONES

Attorney for Respondent on Review.

CRM/csl: 3/1942 [202]

[Endorsed]: No. 10131. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Rose B. Larson, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed May 8, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10131

2

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROSE B. LARSON, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
EARL C. CROUTER,

Special Assistants to the Attorney General.

FILED

JUL 20 1942

PAUL P. O'BRIEN,

CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10131

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROSE B. LARSON, RESPONDENT

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Board of Tax Appeals entered July 24, 1941 (R. 46-68), is reported in 44 B. T. A. 1094.

JURISDICTION

This review involves a claimed deficiency of \$69,-243.49 in income tax of Rose B. Larson for the year 1934. (R. 68.) The Commissioner's deficiency letter was issued January 27, 1937 (R. 14), and the taxpayer's petition to the Board of Tax Appeals was filed April 23, 1937, within the period allowed by Section 272 (a) (1) of the Internal Revenue Code. This review is taken from the Board's order of redetermina-

tion entered November 13, 1941, allowing a deficiency of \$52.91. (R. 68.) The petition for review was filed February 2, 1942 (R. 69-80), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. The transcript of record was filed May 8, 1942 (R. 269), within the time allowed by this Court (R. 3).

QUESTION PRESENTED

Whether, under Sections 22 and 162 of the Revenue Act of 1934, income taxes are due from the taxpayer on interest, rents, dividends and profits derived from her one-half of the community property involved in her deceased husband's estate.

STATUTES INVOLVED

The provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 26-28.

STATEMENT

The Commissioner determined an income tax deficiency due from the taxpayer for the calendar year 1934 in the sum of \$69,243.49, based upon additional income, which with minor adjustments aggregated \$145,396.99. (R. 21.) The Board determined a deficiency of \$52.91. (R. 68.) The evidence before and the findings of the Board chiefly relate to the question whether certain income is taxable to this taxpayer, or to the executor of her deceased husband's estate. Such income consists of items of interest, rentals, dividends and profits from the sale of 85,000 shares of stock of the Sunshine Mining Company. (R. 46-47.)

The Board's findings (R. 48-59) are as follows:

Rose B. Larson, the taxpayer, a resident of Yakima, Washington, is the surviving wife of Adelbert E. Larson, hereinafter referred to as the decedent, who died testate on June 7, 1934. Under the decedent's will, executed May 31, 1934, the Yakima First National Bank of Yakima, Washington, hereinafter referred to as the executor, was appointed executor. (R. 48, 213.)

On June 13, 1934, the decedent's will was admitted to probate and the bank duly qualified as executor. The executor employed a firm of attorneys to attend to legal matters arising in connection with the estate. At the request of the taxpayer the executor also employed Shirley D. Parker, the taxpayer's son, at a salary of \$1,000 a month, to perform services relating to administration of the estate. (R. 48.)

Under date of June 14, 1934, the taxpayer, as surviving wife of the decedent, petitioned the court, sitting in probate, for a widow's allowance of \$5,000 cash and \$1,500 monthly. (R. 48, 49.) The petition stated, among other things (R. 48-49):

That no inventory and appraisement has yet been made, but that the value of said estate, consisting of the community property of the decedent and your petitioner, is approximately \$1,500,000.00.

The petition was allowed. (R 49.)

At the time of the decedent's death all the real and personal property owned by the taxpayer and the decedent was community property. The value of this property, including the interest of the taxpayer

as appraised by duly appointed appraisers of the decedent's estate, was \$2,353,480.79. Included in the community property of the taxpayer and decedent were 210,974 shares of stock of the Sunshine Mining Company. (R. 49.)

The decedent's will provided for legacies aggregating \$482,000 and named the taxpayer residuary legatee. It also provided (R. 49):

Seventeenth: The executor of my estate shall have three years if necessary to liquidate enough property to pay all of the above bequests.

Claims filed against the decedent's estate totaled \$112,140.51. (R. 50.)

At the time of his death the decedent was president of the Sunshine Mining Company. Prior to his death a plan had been discussed with regard to listing the stock of the Sunshine Mining Company on the New York Curb Exchange. The plan had for its purpose the enhancing of the value of the mining company's stock. After the decedent's death the plan was again considered. It was initiated by Carl M. Stolle of Grande, Stolle & Company, who was associated with Walter Seligman of New York City, the owner of a large block of stock in the Sunshine Mining Company. (R. 50.)

Mr. Stolle approached the president of the bank in regard to the participation of the estate of the decedent in the listing plan and stated that a certain number of shares would have to be optioned and sold by the four majority shareholders of the mining company in order that the plan might be a success. The

shares which Stolle wished to purchase and obtain options to purchase amounted to approximately 40% of the total shares held by the four shareholders. The shareholders who were asked to participate in the plan were Alexander Miller and his wife, Mrs. N. P. Hull, J. B. Cox, and the decedent's estate. (R. 50.)

On June 30, 1934, the executor of the decedent's estate entered into five option agreements covering a total of 70,000 shares of Sunshine Mining Company stock. The option agreements were identical, with the exception of the number of shares covered thereby. (R. 50-51.) The provisions of these agreements were as follows (R. 51-52):

For and in consideration of the sum of One and No/100 Dollars (\$1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase 10,000 shares of capital stock of the Sunshine Mining Company in the sum of \$7.00 per share.

* * * * *

The said undersigned does further agree to deposit said stock, to wit, 10,000 shares, in escrow with the Yakima First National Bank at Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of

said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.

* * * * *

Each of the option agreements was accompanied by a letter of escrow instructions. There were seven certificates of stock for various numbers of shares aggregating 70,000. These certificates, together with option agreements and escrow instructions, were deposited with the Yakima First National Bank in escrow on June 30, 1934. Similar option agreements were entered into between Grande, Stolle & Company and the other three majority shareholders. (R. 53.)

The taxpayer and her son, Shirley D. Parker, left for a trip to California on June 14, 1934, and did not return to Yakima until about the middle of July, 1934. Neither the taxpayer nor her son knew of the option transactions until after their return from California. Upon her return from California in July 1934, the taxpayer requested that all matters affecting her interest in decedent's estate be handled by Parker. (R. 53-54.)

Mr. Parker was advised of the options granted by the executor. On July 26, 1934, with Parker's consent and approval, the executor petitioned the probate court for authority to grant options to purchase the 70,000 shares of stock (which the executor had already optioned) and to sell immediately 10,000 shares of that stock. In its petition the executor stated (R. 54):

that it is necessary that some part of the personal property of said estate be sold to pay the specific bequests provided in the will herein, and that your petitioner believes that said offer of the Grande, Stolle & Company is the best offer that could be received for a portion of said stock in the Sunshine Mining Company; * * *.

On the same date the court entered its order authorizing such action. (R. 54.)

On July 31, 1934, the executor petitioned the court for authority to sell to Grande, Stolle & Company 5,000 shares of Sunshine Mining Company stock in addition to the 10,000 shares already authorized to be sold. On the same date the court entered an order containing the following provisions (R. 55):

Now, therefore, it is ordered that the executor be and it is hereby authorized to sell 15,000 shares of stock of the Sunshine Mining Company for the net price of \$5.82½ per share; and

It is further ordered that this order shall supersede the order made on the 26th day of July, 1934, insofar as the sale of 10,000 shares of stock *were* concerned, but shall have no effect upon the order permitting the executor to grant an option to said Grande, Stolle & Company for the sale of 70,000 additional shares.

On August 2, 1934, the estate received the sum of \$87,375 from the sale of 15,000 shares of stock of the Sunshine Mining Company. The 70,000 shares covered by the five option agreements were sold at intervals throughout the year 1934, the estate receiving therefor a total sum of \$483,000. The shares sold

under the options were those represented by the certificates enumerated in the option agreements. (R. 55.)

Neither the taxpayer nor Mr. Parker ever gave permission to sell any of the taxpayer's one-half interest in the community property belonging to the estate of the decedent and the taxpayer. There was no understanding that taxpayer's one-half interest was affected by the stock sales. (R. 55-56.)

Under date of May 1, 1935, the executor of decedent's estate filed with the probate court a petition for partial distribution, stating as follows (R. 56):

1.

That the final report of your petitioner as executor herein is on file and that such final report, together with the inventory shows that included within the estate herein was a total of 210,974 shares of capital stock of Sunshine Mining Company, a corporation, of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, shares to the number of 125,974, of which said shares Rose B. Larson, as surviving spouse, is the owner of 105,487.

2.

That the said Rose B. Larson, as surviving spouse, desires to have distributed to her 15,000 shares of said stock and that your petitioner, therefore, prays for an order of the court permitting and authorizing it to distribute to the said Rose B. Larson forthwith, 15,000 shares of stock of Sunshine Mining Company.

On the same date the court entered an order containing the following provisions (R. 57) :

* * * it appearing to the court that included within the assets of the above entitled estate was an aggregate of 210,974 shares of the capital stock of the Sunshine Mining Company and that all of said property was community property of the decedent and Rose B. Larson, his widow, and

It further appearing that said Rose B. Larson is entitled, as her share of the community property, to receive from said executor, upon the closing of said estate, a total of 105,487 shares, and no good reason appearing why a partial distribution should not at this time be made.

Now, therefore, it is ordered that the Executor herein be and it is hereby authorized and directed to distribute to said Rose B. Larson 15,000 shares of the Sunshine Mining Company, a corporation.

On July 2, 1934, the estate of the decedent received a dividend of \$3,600 from the Surety Finance Company of Yakima, Washington. In her income tax return for the year 1934 the taxpayer included the sum of \$1,570 representing one-half the sum of \$3,140, the amount of the dividend which had accrued at the date of death of the decedent. (R. 57.)

On December 19, 1934, the board of directors of the Surety Finance Company declared a dividend payable on December 31, 1934. A check in the sum of \$3,600, payable to the order of decedent's estate, was issued December 31, 1934, in payment of dividends

on stock of the Surety Finance Company held by the estate. The check cleared through the bank on January 2, 1935. In the notice of deficiency the Commissioner treated this payment as received December 31, 1934, and increased the taxpayer's gross income for the taxable year 1934 by \$1,800. (R. 57-58.)

In his notice of deficiency relating to the taxpayer's income tax for the year 1934 the Commissioner added to the taxpayer's gross income \$2,374.68, representing one-half of the interest on obligations held by the community which was received by decedent's estate during the period from June 7 to December 31, 1934; the sum of \$9,782.49 representing one-half of rentals of community property received by the decedent's estate; the sum of \$33,453.64 representing one-half the amount of dividends from community property stock received by the estate of the decedent from June 7 to December 31, 1934; and \$95,904.77 as profit on the sale of assets. (R. 21, 58.)

The estate of the decedent was under administration throughout the taxable year 1934. The taxpayer kept her accounts and filed her returns on the cash basis. (R. 59.)

STATEMENT OF POINTS TO BE URGED

The Board erred in failing to hold and decide that the taxpayer is subject to income taxes upon all of the interests, rents, dividends and profits derived from her one-half of the community property involved in her deceased husband's estate.

SUMMARY OF ARGUMENT

The taxpayer, as the survivor, had a vested one-half interest in the community property involved in her deceased husband's estate, subject only to community debts, which were negligible in comparison with the size of the estate. The executor had a right to possession of all property, but a right to receive the "rents and profits" of the realty only. Most of the income involved herein, consisting of interests, rents, dividends and stock profits, came from the personalty. The husband's estate owned only one-half of the property, and was liable for income taxes on only one-half of the income from the property. The taxpayer herein owned the other half of such property and should be held liable for taxes on the income therefrom. The community status remained fixed, and was not disturbed by the pendency of the estate. The taxpayer had a right to her share of the income as it accrued, since there was no claim against such income for community debts. The income-tax deficiency is a debt due from the taxpayer and is not collectible from the estate.

The Board's decision is not in accordance with its prior decisions in similar cases. The record clearly shows that the community shares of stock were sold, resulting in the profits sought to be taxed, and the Board's finding that only the stock of the estate was sold is not supported by the substantial evidence in the case, or in accordance with the community-property ownership. The taxpayer had the beneficial use of some of this income, during the taxable year, and

should be taxed accordingly, on an annual basis, in accordance with the requirements of the revenue laws.

ARGUMENT

The taxpayer is subject to income taxes upon the interest, rents, dividends and profits derived from her one-half of the community property involved in her deceased husband's estate

The record is clear that all of the property, both real and personal, involved herein, was community property of the taxpayer and her husband. (R. 49.) As shown by the statement, *supra*, there were various substantial holdings of real and personal property in which this taxpayer had the usual one-half interest based upon the community property rights in the State of Washington. The record shows that this property produced the income, the main question involved herein being whether such income is taxable entirely to the estate, as held by the Board, or to the estate and this taxpayer, in accordance with her community-property rights and interest in the property.

The taxpayer apparently conceded that "she had a vested interest in the property", but contended that "she was not entitled to its income during the period of administration". (R. 60.) The Board held, as it stated (R. 62) that "the entire income on community property during the period of administration is receivable by the estate" and hence taxable to the estate. The Commissioner contends that this decision is erroneous with respect to all of the various classes of income stated above and enumerated in the statement of points relied upon for review. (R. 83-87.)

Section 22 of the Revenue Act of 1934 (Appendix, *infra*) specifically provides that gross income includes “profits * * * interest, rent, dividends * * *”. When such income is community income, in Washington, one-half of it is taxable to the wife. *Poe v. Seaborn*, 282 U. S. 10.

The pertinent Washington statutes are set forth in full, in so far as pertinent, in the Appendix, *infra*. Section 6892 of Remington’s Revised Statutes of Washington provides that property not acquired or owned as separate property which is “acquired after marriage by either husband or wife, or both, is community property”.

Section 1342 of the same statutes (Appendix, *infra*) provides in part:

Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. * * *

Section 1464 of the statutes (Appendix, *infra*) provides, in part, that every executor shall—

* * * have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, * * *

Section 1465 (Appendix, *infra*) requires the executor or administrator to make an inventory of “all of the property of the estate which shall have come into his hands * * *”.

It is well established, of course, that the wife has a vested one-half interest in community property and is entitled to report one-half of the income from such property in her separate return, notwithstanding that such property is subject to the husband's management and control during his lifetime. *Poe v. Seaborn*, 282 U. S. 101; *Warburton v. White*, 176 U. S. 484. On the death of the husband only his half of the community property is includable in the gross taxable estate for federal estate tax purposes (*Lang v. Commissioner*, 304 U. S. 264); likewise as to state inheritance taxes (*In re Coffey's Estate*, 195 Wash. 379). In the *Coffey* case the court stated (pp. 385-386):

* * * since the premiums were paid with community funds, the wife had an undivided one-half interest in the policies. Only the husband's one-half interest therein may be included in his gross estate * * *.

This interest of the wife has been termed a "sacred" right (*Guye v. Guye*, 63 Wash. 340, 342) and protected from loss by her husband's bill of sale (*In re McGovern's Estate*, 181 Wash. 231) or change of beneficiary of life insurance proceeds (*Occidental Life Ins. Co. v. Powers*, 192 Wash. 475). In the *Occidental Life Ins. Co.* case *supra*, the court stated (pp. 484-485):

In this state, as stated in those cases, and as has always been stated by this court, the wife has a vested property right in the community property equal with that of her husband *and in the income of the community*, including salaries or wages of either husband or wife, or both. [Italics supplied.]

In re Binge's Estate, 5 Wash. (2d) 446, involved separate property as against a claim that it was community property. The court there stated the general rule as to "status" as follows (p. 484) :

It is the rule in this state that the status of property, whether real or personal, becomes fixed as of the date of its purchase or acquisition; and that the status, when once fixed, retains its character until changed by agreement of the parties or operation of law.

In the instant case the status has not been changed by any agreement of the parties; and we are unable to find that there has been any change by operation of law.

In the case of *In re Gulstine's Estate*, 166 Wash. 325, the court held that where a ranch was in part community and in part separate estate, the funds constituting *net income* from the land should be carried over into the distribution in the same proportions. It stated (p. 334) :

We hold that the title to the ranch is three-elevenths the separate estate of the deceased, and eight-elevenths community estate, and that the separate interest should be carried over into the distribution of the accrued net profits which have arisen from the property.

Generally, of course, income taxation follows ownership and rights thereof. *Helvering v. Clifford*, 309 U. S. 331; *Blair v. Commissioner*, 300 U. S. 5; *Burnet v. Leininger*, 285 U. S. 136; *Poe v. Seaborn*, *supra*. Income taxes have been allocated accordingly to a surviving wife and her husband's estate, in accordance

with their community and separate interests in property producing the income in the State of Washington. *Compton v. Commissioner*, 11 B. T. A. 26.

Drumheller v. Commissioner, 27 B. T. A. 209, petition for review dismissed, 65 F. (2d) 1013 (C. C. A. 9th), arose in Washington and involved taxation of dividends to the surviving husband or to the wife's estate. The Board held, as it stated (p. 213):

* * * half of the community income should be taxable to the petitioner, and the other half to the estate of his deceased wife.

We believe that this decision is more in accordance with the Washington law than the Board's decision herein.

It is apparent that one of the effects of the Board's decision will necessarily require an attempt to saddle the estate with the taxes otherwise due from the surviving spouse. Shifting of such tax liability is not in accordance with the settled law of Washington that this cannot be done as to other liabilities. For instance, federal estate taxes must be deducted from the part of the estate inherited, and not from the community state as a whole. [*Wittwer v. Pemberton*, 188 Wash. 72. In that case the court stated (p. 79):

Since, for the purpose of determining liability for Federal income taxes, the community income was reported in two equal parts, one as belonging to the wife and the other to the husband, it would seem to follow that the personal liability for the tax would be several, and that collection by distraint could be had only in severalty against the half interest of each spouse in the community estate. * * *

The decedent's estate only is liable for his separate debt (*In re McHugh's Estate*, 165 Wash. 123, 124), or tort (*Bortle v. Osborne*, 155 Wash. 585). In the *Bortle* case, *supra*, the court stated (p. 589):

By the community property law of this state
 * * * the legislature did not create an entity or a juristic person separate and apart from the spouses composing the marital community.

See also *Huyvaerts v. Roedtz*, 105 Wash. 657, 659; *Schramm v. Steele*, 97 Wash. 309, 315-316.

As shown above, Section 1342 of the Washington statutes provides that upon death of the other spouse, "one-half of the community property shall go to the survivor, subject to the community debts * * *". The "one-half", in fact, goes where it has always been. And it seems clear that the words "subject to" are used in their usual sense, i. e., affected by, exposed to, liable for, in the contingency of, or to qualify something substantial and already created. *White v. Hopkins*, 51 F. (2d) 159, 163 (C. C. A. 5th); *Brown's Estate*, 289 Pa. 101. A transfer, "subject to" an existing agreement, gives the transferee the benefits as well as the disadvantages of the agreement. *Bacon v. Grossman*, 71 App. Div. (N. Y.) 574, 578. This does not mean that, in the instant case, title, or even equitable ownership, is disturbed, or lost. During the husband's lifetime, the wife's vested half interest in the community property, as well as the husband's half interest, was subject to community debts, and the husband had full management and control. Upon his death the wife's half interest, as well as the husband's

half, continued to be subject to community debts until the estate was fully administered. Yet the Board holds that the wife is not taxable, though the executor has only a degree of the control formerly exercised by her husband when she was taxable. *Poe v. Seaborn, supra*.¹

The Court's attention is particularly invited to the provisions of Section 1464 of the Washington statutes, *supra*. It recognizes the executor's "right to the immediate possession" of all the real and personal estate of the decedent, and then provides that he "may receive the rents and profits of the real estate * * *". In view of Section 1342, it is questionable to what extent that provision applies in so far as community property is concerned, but in any case we think it clear that the executor merely collects the income for convenience and the wife is not thereby deprived of her interest in it. In the instant case, as shown above, most of the income, consisting of interest, rents, dividends and stock profits, is from personalty. Substantial dividends were paid upon all of the Sunshine Mining Company stock involved herein. (R. 211.) It would seem to be clear that in the absence of any assertion of any claim for community debts,² the ex-

¹ The wife might have applied for authority to administer the community property separately, but as far as the record shows she did not do so. Section 1419, Remington's Revised Statutes of Washington.

² No consideration was given to selling assets to pay debts. (R. 117.) All claims aggregated about \$100,000 (R. 114-115, 226), as against an estate of \$2,353,480.79 (R. 49), and at least \$50,-106.83 of the claims apparently was for "administration". *In re Thomas' Estate*, 140 Wash. 296.

ecutor had no right whatever to any of this income. The taxpayer's real rights to her community property, and the income therefrom, therefore were not disturbed. Section 6898 of the Washington statutes (Appendix, *infra*) specifically requires that the community property laws be "liberally construed". The executor had merely the same right to collect income and use it for paying community debts as the husband had during his lifetime. There is no merit to the contention that she is not taxable because she did not actually receive the rents. She was taxable during her husband's lifetime on one-half of all rents, irrespective of whether or not she received any part of them. She is taxable in the same way after his death.

It should be noted, moreover, that the debts and charges against the estate were only about \$50,000 (See footnote 2, *supra*), (R. 49, 114-115, 226), so that the wife's half interest was not in fact absorbed by the debts.

Thatcher v. Capeca, 75 Wash. 249, held that a surviving husband, without proper administration or authorization of any probate court, could and did give a valid deed to his interest in certain realty, and that his right to the property was complete as soon as the expenses of administration were paid. The court stated (pp. 253-254):

Upon the death of Catherine Stetson, one-half of the property went to him in his own right, subject only to the community debts, and the expenses of the administration. When these were satisfied, his title to the one-half became absolute, and he was then entitled to

have such portion segregated from the portion of the heirs and set apart to him.

Griffin v. Warburton, 23 Wash. 231, held that where all the debts and expenses of administration had been satisfied, and the administrator and heirs agreed to abandon the probate proceedings, the title to the realty there involved became absolute in the surviving husband immediately upon the death of his wife, and was valid in the hands of a subsequent transferee. In showing that the administration was only to satisfy valid claims against the estate, and that when such claims were satisfied the estate was fully administered, the court stated (p. 238) :

When the claims of creditors are paid or barred, and the costs and charges of administration are satisfied, the estate is for all practical purposes fully administered upon, the right of possession in the administrator terminates, and the right of the heirs to the residue of the estate in his hands becomes absolute. The heirs are then entitled to have this residue delivered over to them as their own property, under the law; and it is made the duty of the administrator, by the statute, to surrender the property to them. This duty they can enforce by obtaining a decree of the court directing its performance. As such a decree, however, neither creates their title, nor their right of possession, to the property, a distribution made without it cannot be invalid.

Likewise, herein, there is little reason for the view that the taxpayer's income and tax liability have in some manner been shifted to the estate—which is not liable for her debts. It is feared that the Board's

decision enables her to avoid her just taxes, even though, in a large measure, through the above-mentioned "advances" she apparently enjoyed the use of much of this income during the taxable year. Income taxes, of course, must be levied on an annual basis (*Burnet v. Sanford & Brooks Co.*, 282 U. S. 359) and may be "realized" even though not directly received (*Helvering v. Horst*, 311 U. S. 112).

We believe that *Barbour v. Commissioner*, 89 F. (2d) 474 (C. C. A. 5th), on which the Board relies (R. 62), is distinguishable. It arose under a different statutory scheme, in Texas, where the executor held "all such common property * * * in trust".³ Moreover, the court in that case stated (p. 476) that "When and if Mrs. Barbour receives this profit from the executors she should, of course, account for and pay the taxes on it". In the instant case the taxpayer did receive at least some of the money in question as a dividend and some "advances" in the total sum of \$28,674.90, the exact nature of which is not clear from the record. (R. 191-192, 213, 219.)

The decisions of the Supreme Court of Washington relied upon by the Board (R. 62) do not go far enough to indicate that the taxpayer herein is not taxable upon her half of the community property. *Stanton v. Everett Trust & Savings Bank*, 145 Wash. 165, merely held that an heir of a wife is not entitled to

³ Vernon's Texas Statutes (1936), Article 3630, provides:

Property held by Executor.—Until such partition is applied for and made, the executor or administrator of the deceased shall recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto.

separate administration upon her interests, but must seek relief in a pending administration of the husband's estate. The court there, at page 169, speaks of administration "upon the community *property of the spouses*" in one proceeding. [Italics supplied.] *Crowe & Co. v. Adkinson Const. Co.*, 67 Wash. 420, chiefly dealt with the requirement of filing claims against the estate, and does not directly support the Board's decision herein.⁴ *In re Guye's Estate*, 54 Wash. 264, also relied upon by the Board (R. 62), merely held that the deceased, rather than his wife, could name the executors to administer the estate. *Ryan v. Fergusson*, 3 Wash. 356, also was a different case, involving a court sale of mortgaged property.

The remaining issue is whether or not one-half of the profit derived from the sale of 85,000 shares of stock of the Sunshine Mining Company by the executor was taxable to this taxpayer. She contended and the Board held that the sale in question was a sale of shares belonging exclusively to the estate. (R. 62-63.) The principal basis of the Board's holding was that, since the shares aggregated 210,974 and the court's final order stated that 85,000 had been sold, leaving 125,974 of which the surviving spouse was the owner of 105,487, it must necessarily be concluded that the husband's shares rather than the wife's were sold.

We submit that this conclusion is untenable. The taxpayer was residuary legatee under her husband's

⁴ The court there stated (pp. 424-425) :

The respondent further contends that the lien is enforceable against the undivided one-half of the property owned by the widow. This view is not sound.

will as well as the owner of a one-half interest in the community property. The order of the probate court authorizing the sale of the stock shows that both the executor and this taxpayer, as the surviving widow and residuary legatee, applied for such authority, in 1934. (R. 154-155.) The final order of the court, which was not entered until May 1, 1935, did not state that the 105,487 shares represented her community interest in 210,974 shares, but that she as surviving spouse was entitled to that many shares. It therefore authorized distribution to her of 15,000 shares. (R. 157-158.) Part of these may have been received as residuary legatee, and the order authorizing the sales did not state whether shares belonging to the husband or wife were being sold. There had not previously been any division of the shares. All were in the executor's possession. Inasmuch as the wife owned a one-half interest in each share of stock, the sale in the absence of any division was necessarily a sale of the shares as community property in which the wife had a one-half interest. The Board's opinion that the order of the probate court is conclusive, and that the case is governed by *Helvering v. Rhodes*, 117 F. (2d) 509 (C. C. A. 8th) (R. 66), therefore is erroneous. That order did not determine the issue in this proceeding. See *Tooley v. Commissioner*, 121 F. (2d) 350 (C. C. A. 9th). Cf. *In re Larson's Estate*, 200 Wash. 318.⁵

⁵ In that case the taxpayer sued the executor and others for alleged unjust enrichment with respect to the sale of these identical shares of stock, and failed, the court holding (p. 337) that she acted with full knowledge of the facts.

We submit further that there is no substantial evidence in support of the Board's finding (R. 55-56) that neither the taxpayer nor Mr. Parker (the taxpayer's agent) gave permission to sell any of the taxpayer's one-half interest in the community property belonging to the estate of the decedent and the taxpayer, and that there was no understanding that the taxpayer's one-half interest was affected by the stock sales. The son, Mr. Parker, gave his approval to the sale. He was his mother's agent and in talking with Stolle no distinction was made between the decedent's interest and hers. He was selling the community property.

Both Robert M. Hardy, the representative of the estate, and Carl M. Stolle, who was interested in purchasing the shares, testified that it made no difference to the purchaser whose stock was being sold. (R. 107, 111, 112.) Mr. Stolle testified that he talked to Mr. Parker and did not distinguish between the sale of any interest of Mrs. Larson and the sale of any interest of the decedent in the stock. He said that he wanted approximately 40% of the various holdings of this stock for trading purposes; that he wanted 80,000 shares "from the Larson interests" and ultimately this was increased to 85,000 shares; and that it made no difference to him "whether it came out of Mr. or Mrs. Larson's half". (R. 137.) Nat U. Brown, attorney for the estate, also testified that no consideration was given to the matter of whose stock was being sold as between Mrs. Larson's interest and the estate's interest. (R. 112, 114.)

It therefore seems clear that there was not, in fact, any segregation or distribution of stock of the estate for sale, but that the community shares were sold, and that the profits should be taxed to both owners accordingly. In view of the clear evidence of the wife's ownership, as set forth above, which the Board seems to have overlooked, the Board's findings are not supported by the substantial evidence in the case. Neither are the findings and conclusion in accordance with the evidence and the law. The Board failed to give full consideration to the taxpayer's ownership and her knowledge of and participation in the sales of the community stock, through her agent (R. 53-54, 115, 153, 154, 259), resulting in the profits which should be partly taxed to her.

CONCLUSION

It is therefore respectfully submitted that the petition for review should be granted and the decision of the Board reversed.

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JULY 1942.

APPENDIX

Revenue Act of 1934, C. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same

basis as in the case of an individual, except that—

* * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

Remington's Revised Statutes of Washington:

§ 1342. *Descent of community property.* Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

§ 1464. *Right to possession and management.* Every executor or administrator shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate posses-

sion of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his control.

§ 1465. *Inventory of estate—Appraisement.* Every executor or administrator shall make and return upon oath into the court, within one month after his appointment, a true inventory of all of the property of the estate which shall have come into his hands, and within thirty days after filing such inventory he shall make application to the court to appoint three disinterested persons to appraise the property so inventoried, and it shall be the duty of the court to appoint such appraisers. * * *

§ 6892. *Community property defined—Husband's control of personalty.* Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

§ 6898. *Liberal construction.* The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of the state respecting the subject to which it relates; and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.

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Petitioner,

VS.

ROSE B. LARSON, *Respondent.*

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STATES BOARD OF TAX APPEALS

RESPONDENT'S ANSWERING BRIEF

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FILED

MAR 25 1932

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RESPONDENT'S ANSWERING BRIEF

The petitioner's assignments of error (R. 75) and statement of points (R. 83) embrace a number of questions not mentioned in the brief *e.g.* item 8 (R. 84) relating to time of receipt of dividends. We assume that such assignments or points not argued are waived, and therefore shall confine our answer to the two propositions discussed in the opening brief which, although presented by the petitioner as one, may be more properly divided into the following specific questions:

1. In the case of the death of the husband in a community property state, leaving only community property, which is administered by the executor nominated by his will, is the income from such property received by the executor and during the course of administration, taxable entirely to the estate or executor, or is one-half thereof taxable to the surviving spouse?
2. Was a certain sale by the executor of 85,000 shares of Sunshine Mining Company stock made from the interest of the deceased only, or equally from the interests of the deceased and his surviving spouse, the respondent?

We shall discuss these two propositions in order.

I.

ALL THE INCOME RECEIVED BY THE EXECUTOR FROM COMMUNITY PROPERTY DURING THE COURSE OF ADMINISTRATION WAS PROPERLY RETURNED BY AND TAXED TO THE EXECUTOR AS FIDUCIARY.

The decedent died June 7, 1934. His will, which was not a non-intervention will, named the Yakima First National Bank as executor and it immediately petitioned, was appointed, qualified and took control of the administration of all of the property of the community. Publication of notice to creditors was begun on June 20, 1934, and time for presentation of claims did not expire until December 20, 1934 (R. 48, 174-175). The estate could not have been settled and distributed, and there was in fact no proceeding or order for distribution thereof during the taxable year 1934. The will (R. 260) made provision for specific bequests totalling approximately \$480,000 (§§ 3-15, R. 260-263) and gave all of the residue to the respondent (§16, R. 263). It made no provision for distribution during administration. By paragraph 17 it provided that the executors, if necessary, should have three (3) years to pay the bequests (R. 263).

During the year 1934 the executor received income from the real and personal property of the estate and included all of such income in its federal tax return rendered on behalf of the estate, and the Commissioner received the full tax on all of such income from the executor. In this proceeding the Commissioner seeks to tax respondent upon one-half of the income received by the executor from the community property.

The statement at page 16 of petitioner's brief that the decision in this case will "require an attempt to saddle the estate with the taxes otherwise due from the surviving spouse" implies that the estate has not paid the tax and that the commissioner might encounter difficulty in collecting from it. Such, however, is not the case. The whole income was returned and the tax paid by the estate and the commissioner has assessed the liability and retained the tax from the estate on that basis (R. 89-90).

The question presented is purely one of law as to the application of the federal income tax law, and particularly the provisions respecting returns by estates, to property rights determinable by the statutes and decisions of the state of Washington. In addition to the statutory provisions set forth in the appendix to petitioner's brief, we call attention to article 162-1 of Commissioner's Regulations 86 having to do with the collection of income taxes under the Revenue Act of 1934, and to Section 1419 Remington's Revised Statutes of the State of Washington which is a part of the general statutory provisions relating to administration of community property (Note 1).

NOTE 1. Regulations 86, applicable under the Revenue Act of 1934, provide in part as follows:

"ART. 162—1. Income of estates and trusts.—
 "* * *

"The income of an estate of a deceased person, as dealt with in the Act, is therein described as received by the estate during the period of administration or settlement thereof. * * *

"The tax upon the net income of the estate or

Before presenting respondent's side of the case, we shall consider briefly two contentions underlying petitioner's argument, both of which we submit are erroneous:

1. Petitioner contends that because the surviving wife has a vested interest in community property she must return the income therefrom during administration, relying on *Poe v. Seaborn*, 282 U. S. 101, and cases of similar import (Petitioner's brief pp. 14 and 15). However, the question here is not determinable by reference to the actual or beneficial interest, any more than any other case of trust income which is returned by and taxable to a trustee who holds the property and receives income for the beneficial owner.

trust shall be paid by the fiduciary (see section 161 (b)). If the tax has been properly paid on the net income of an estate or trust, the net income on which the tax is so paid is not, in the hands of the distributee thereof (the legatee or the beneficiary), taxable as income to him."

Remington's Revised Statutes of the State of Washington provide:

"§1419. Community property, how administered. A surviving spouse shall be entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property."

The real question is: To whom does the income from community property go during the period of administration? If it goes to the executor, then it is taxable to the trust or the estate, regardless of the beneficial rights of others, by virtue of the express provisions of the statute, subject only to the statutory limitations regarding amounts paid or distributable. It is a question of receipt and control during administration, not of ultimate beneficial interest. The rights of decedents' heirs or legatees are just as much vested as those of the survivor, and there is no basis for distinction in return of the income, as long as the estate is under administration.

2. It is suggested by implication that the executor had no right to receive or control the income from the community personalty (Pet's. br. p. 18). It seems to be assumed, although the contention is not definitely stated, that because Section 1464 of Remington's Revised Statutes provides that the executor "may receive the rents and profits of the real estate," it was intended to exclude the right of the executor to receive the income from community personal property. However, the Washington decisions, to which we shall refer, show that this contention is entirely unfounded. During administration, title to all of the community personal property vests in the executor and he is entitled to receive the income. This fundamental proposition is so well established both by general probate law and specific decisions of the Washington courts that apparently no statute was deemed necessary as to personal property; but as to real estate, title to

which passes to the heir or devisee immediately upon death, a special statute was enacted to insure that during administration the rents and profits therefrom should go to the executor. The purpose of the statute was not to restrict, but to amplify the powers of the executor.

By the decisions of the Supreme Court of Washington it has been firmly established that in administration under the probate code of the state upon the death of a member of a community, the entire community estate and not merely the decedent's interest therein is subject to administration proceedings. This rule has been followed ever since *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910, holding:

“But after a careful consideration of the question, and from the interminable confusion that would otherwise result, we are forced to the conclusion that upon the death of one member of the community it is the community estate which is to be administered upon for the purpose of settling the claims against the community, and that in this case the probate court not only acted upon the separate property of John H. Ryan, if he had any, but also upon the community property of the deceased and of Lucy A. Ryan.”

Continuing, on page 361:

“Neither one owns any specific part of this property before the dissolution of the community, and upon its dissolution by the death of one member no part of it can vest in the survivor except subject to the community debts.”

Then on page 363 the court added:

“The statute says one-half shall go to the sur-

vivor subject to the community debts, and from the very nature of the case it is held in abeyance or suspended to that extent, and *cannot go until these matters are determined and disposed of, and that which is to go is thus ascertained.*" (Italics ours)

The reason for the rule is stated in *Guye's Estate*, 54 Wash. 264, 103 Pac. 25, as follows:

"Owing to the peculiar characteristics of the community estate, administration upon an undivided one-half interest therein is impracticable, if not impossible, so that administration upon the whole estate is indispensable upon the death of either spouse. The right to name the executor or administrator must vest in either the husband or wife; for, in the nature of things, there cannot be two personal representatives for the same estate acting independently of each other."

To the same effect see:

Stanton v. Everett Trust & Savings Bank,
145 Wash. 165, 259 Pac. 10;

In re Hill's Estate, 6 Wash. 285, 33 Pac. 585;

Bank of Montreal v. Buchanan, 32 Wash.
480, 73 Pac. 482;

Magee v. Big Bend Land Co., 51 Wash. 406,
99 Pac. 16;

Crowe & Co. v. Adkinson Const. Co., 67
Wash. 420 at 424, 121 Pac. 481.

As we have already stated above, during administration the executor is not only entitled to possession of and rentals from community real estate but is vested with the legal title to all of the personal property and income.

“It (the personal property) descends to the executor or administrator for the payment of expenses, debts, legacies and for distribution of the residue.”

Devereaux v. Anderson, 146 Wash. 657, 264 Pac. 423.

The rule is so well settled that it seems unnecessary to set forth more than the following quotation from *Collins v. Northwest Casualty Company*, 180 Wash. 347, 39 P. (2d) 896:

“As to the right of Wallace, the specific bequest of the car would not be effective to confer upon him any control pending probate of the will. After probate, title vested in the executor, subject to the claims of creditors of the deceased. Title to the car could come to Wallace only through the executor at the close of administration.

“‘The personalty of the deceased goes primarily to the executor or administrator as assets and not to the heir, and this had been held to be true even though there are no debts, and one claiming the personalty is the sole distributee. The title of an executor or administrator with the will annexed to particular personal property is not affected by the fact that it was specifically bequeathed or has been set aside for the payment of a particular legacy.’ 23 C.J. 1127.

“‘It is the settled law of this state that executors and administrators are entitled to the possession and control of the property, both real and personal, of estates while being administered by them, as against heirs and devisees, as well as all other persons. Rem. & Bal. Code §1366, 1449, 1534; *Gibson v. Slater*, 42 Wash. 347, 94

Pac. 648; *Griffith v. James*, 91 Wash. 607, 158 Pac. 251; *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997." (180 Wash. 347, 351)

In support of his contention that Sections 161 and 162 of the Revenue Act of 1934 do not apply to the income from all of the community property during administration the petitioner relies only on appeal of *Geo. Drumheller*, 27 B.T.A. 209. Petition to review was taken by Commissioner to this court and dismissed on his motion with consent of respondent, 65 F. (2d) 1013. That case is not applicable for a number of reasons. In the first place that proceeding did not involve the question as to whether the income on the half of the community property representing the share of the survivor should be taxed to the estate rather than to the survivor. There the taxpayer was complaining only because the commissioner was taxing *all* of the income on community property to him individually although the estate was in course of administration, but was not complaining about being taxed on one-half thereof, and was only insisting that one-half should be taxed to the estate. While the case involved a non-intervention will, the non-intervention features of the statute were not applicable because the estate was insolvent. The Board sustained the petitioner as survivor of the community in his contention that one-half of the community income should be taxed to the estate, even though it appeared from the Commissioner's determination that the entire income had been distributed to the petitioner. The case did not involve and, therefore, would be no authority for the proposition that all of the income from community

property during administration should not be returned by and be taxable to the estate. The Board recognized this distinction in its opinion (R. 63).

Moreover, if the *Drumheller* case might be considered authority for the petitioner's position, it no longer has any force to that effect in view of the Board's direct decision to the contrary in this case, recently re-affirmed in memo decision in the appeal of *S. P. McBirney*, Docket No. 108982, entered June 23, 1942, in which it said:

"We are of the opinion that the respondent's contention must be sustained. It is immaterial that ownership of the property in question may have been vested in the heirs at the time of the decedent's death. It is plain that all of the decedent's property was subject to administration as a part of the estate and that the administratrix was entitled to possession of the property under the control of the court having probate jurisdiction until the administration was completed. Chapter 5, sections 290-291, Oklahoma Statutes, Annotated. Cf. *Wagner's Estate* (Okla. 1936) 62 P. (2d) 1186. There is no question but that the actual administration of the estate continued throughout all of the taxable years. In view of these circumstances the income from the property was received by the estate during the period of administration and is taxable to it in accordance with the provisions of section 161 (a) (3), *supra*, despite any vested interests in the heirs. *Rose B. Larson*, 44 B.T.A. 1094. Cf. *Estate of Lucile Gruy*, 42 B.T.A. 1279."

The decision of the Board in the appeal of *Anna L. Compton executrix*, 11 B.T.A. 26, cited by peti-

tioner at page 16 of his brief, did not involve taxation of income arising after the decedent's death and during administration, but concerned the allocation of separate and community property income prior to death, and therefore has no bearing on the present situation.

The most direct court decision on this point is *Barbour v. Commissioner* (C.C.A. 5) 89 F. (2d) 474, 37-1 U.S.T.C. §9222, involving the law of Texas, which is quite similar to that of Washington with respect to administration upon the entire community property. In that case the Commissioner had held and the Board affirmed (memo decision) that profit on sale of stock belonging to a marital community of Texas, sold after death of husband, was taxable one-half to the surviving spouse. Presumably the other half was taxed to the estate. In reversing such holding the court pointed to statutes and decisions of Texas substantially similar to those of Washington with reference to administration of the entire community upon the death of one spouse, and upon consideration of such provisions, held that the income received by the administrator of the estate, while the administration is in progress, is returnable and taxable as income of the estate, and not of the beneficiary. "It is settled that income received by the administrator of an estate, while administration is in progress, must be returned and taxes paid on it as income of the estate, and not by the person ultimately entitled to it" (89 F. (2d) at 476). This, of course, is simply the provision of the Revenue Act of 1934, Sections 161 and 162, which taxes the income to the one who

receives it regardless of the ultimate beneficiary, unless it is actually or constructively distributed. This case has been accepted by the commissioner and applied by the general counsel for the Bureau of Internal Revenue (See GCM 20472 '38 C.C.H. §6491), and so far as we know has never been questioned outside of this proceeding. It was recently recognized by the Board in the appeal of the *Estate of Lucile Gruy*, 42 B.T.A. 1279:

“If the community property remained under administration in 1935 and the income in question was received by Joseph Gruy in his fiduciary capacity as independent executor of the estate of Lucile Gruy, it is taxable to the estate, as respondent contends. *Barbour v. Commissioner*, 89 F. (2d) 474.” (11 B.T.A. at 1285)

A number of other cases have touched on the point, but not so directly as the *Barbour* case. However, the decision of this court in *Alice J. Rosenberg, Administratrix v. Commissioner*, 115 F. (2d) 910, affirming an unreported decision of the Board, is in its general language very apropos. That case involved income from community property which, however, had been acquired prior to July 29, 1927, the date when the California law changed the wife's community interest from an expectancy to a vested interest. Petitioner's husband died in 1929 and the Commissioner determined that all income from community property during administration was taxable to the estate. The petitioner, as survivor of the community and residuary legatee, contended that the income on her community one-half should be taxed to her, rather than

to the estate. In affirming the Board opinion, this court said:

“Whatever difference may have existed between the rights of heirs in the property of an intestate and the rights of the widow in community property acquired by her husband and herself prior to the year 1927 it is clear that upon the death of the husband their property is subject to administration in the Superior Court sitting in probate. That court not only determines what debts and what expenses of administration are to be paid therefrom but also determines what part of the property of the decedent is community property, when it was acquired, the attributes thereof, and the respective rights of the widow and heirs, devisees or legatees therein. Until the administration of the estate it cannot be determined authoritatively by any other courts what property is and what property is not community property or how the distribution shall be made. (Cal. Probate Code, Deering, 1937, §202,300)

“In view of these considerations the community property is to all intents and purposes a part of the estate of the deceased husband which, under the revenue laws of the United States, is treated as an entity having duties and obligations during the administration of the estate which are distinct from those of the owner of the property which is subject to administration. (Revenue Act of 1932, c.209, 47 Stat. 169, sec. 161 (A) (3), *Id.* Sec. 162 (c), Treasury Regulations 86.)”

Irrespective of the nature of the community interest under the California law, the reasoning of the court in justification of taxing the entire income to

the estate during administration is equally applicable to the administration of community estates under the law of Washington, and supports the position of the petitioner in this proceeding.

In the appeal of J. H. Tippitt, administrator of the *Estate of Laura Tippitt*, 25 B.T.A. 69, involving the precise question of whether all of the income from community property during administration under the laws of Texas should be taxed to the estate, the Board held that it was so taxable, saying:

“It is of course true that upon the death of Laura Tippitt, her interest in the community real estate immediately vested in her heirs, who were the minor children, whose names have already been stated in our findings of fact. But that fact does not affect the control of the community administrator or survivor over the property. Until the community administration is closed, the income from the estate would be taxable in the hands of the administrator, the same as any other estate, under section 219, which we have quoted.”
(25 B.T.A. 76)

(Section 219 is cited from the Revenue Act of 1926, which is similar to Sections 161 and 162 of the Revenue Act of 1934).

The recent decision of this court in *Frank B. Anderson v. Commissioner*, 126 F.(2d) 46, 42-1 U.S.T.C. §9308, while not directly involving the same point, contains a recognition of the same principle. The decedent left an estate which was considered to be all community property, which was finally distributed by decree dated December 30, 1936. For the year 1936 the wife filed a return which included distribution

from the estate to herself. The commissioner determined a deficiency on the ground that the entire net income for that year was taxable to the estate. The Board sustained the determination and this court affirmed it. While the point directly presented was whether distribution under the final decree was a distribution of the corpus or currently of income, the holding that the entire income was taxable to the estate necessarily involved as a corollary the proposition that one-half of the income from community property during administration is not taxable to the surviving spouse.

Under the foregoing rules and decisions and under the plain wording of the statute governing return and taxation of trust income, including "income received by estates of deceased persons during administration or settlement of the estate," it seems clear the decision of the Board is correct and that the entire income of the community property was properly returned by and taxed to the estate for the year 1934 when it was in course of administration.

II.

THE SALE OF 85,000 SHARES OF CAPITAL STOCK OF SUNSHINE MINING COMPANY WAS INTENDED TO BE AND WAS IN FACT AND IN LAW A SALE OF DECEDENT'S INTEREST ONLY AND NOT OF RESPONDENT'S INTEREST IN SUCH STOCK.

The second question is primarily a factual one, although in arriving at its determination of fact, the Board gave consideration to statutes and decisions of the State of Washington governing the disposition of community property by the decedent and its management by the executor and the legal effect of the probate court orders with respect thereto. The legal result, however, is controlled by the intent of the parties as to whose stock was to be sold. Intent is a matter of fact, *Von's Investment Co. v. Commissioner* (C.C.A. 9) 111 F. (2d) 440; and the Board's conclusion with reference thereto upon the evidence and inferences therefrom is not subject to review. *Wilmington Trust Company Executors v. Helvering*, 86 L. ed. 908, 42-1 U.S.T.C. §9441; *Chicago Stock Yards Co. v. Commissioner* (12th Cir.) 1942 C.C.H. §9607 (decided July 24, 1942). The petitioner recognizes this but contends that the findings are without substantial supporting evidence (petitioner's brief 24). We will therefore briefly review the record on this point.

The community property included 210,974 shares of stock of the Sunshine Mining company, of which decedent was president. The matter of listing the stock on the New York Exchange had been considered but disapproved by decedent shortly before his death,

and shortly afterward was revived by Mr. Stolle, a broker associated with one of the stockholders. He took the matter up with Mr. Hardy, president of the Yakima First National Bank, executor of the estate, and who had also succeeded decedent as president of the mining company, to see about getting options on a desired amount of stock as a basis for listing. These negotiations resulted in the execution of five (5) option agreements running from the executor of the estate to Grande, Stolle & Co. dated June 30, 1934, for the purchase by the optionee of 70,000 shares of Sunshine Mining Co. stock (R. 49-53).

Respondent knew nothing of such negotiations or options until about the middle of July, 1934, as she had left for California on June 14th, and did not return until that time. Mr. Hardy went to see her shortly after her return and she told him to take up the matter with her son Shirley Parker, and whatever he approved would be satisfactory (R. 99). Hardy did so, and they in turn consulted Mr. Brown, attorney for the estate, about certain legal phases of the matter (R. 100). Mr. Hardy had no discussion with either respondent or Mr. Parker as to whether any of her community interest, as distinguished from that of the decedent, was to be affected, and Mr. Stolle, who got the option, was not interested in who the stock belonged to as long as he got the desired quantity (R. 137). The matter of whose stock was being sold was left up to the attorneys (R. 103). That was gone into specifically by Mr. Brown, attorney for the estate (R. 111).

Mr. Brown had no discussion with Mr. Parker or respondent to the effect that any part of her interest was being sold (R. 114). The reason for the sale was to obtain money to pay the specific bequests amounting to approximately one-half million dollars (R. 114). He considered what right the executor had to sell the property of the estate and that only the decedent's one-half could be sold to pay specific bequests, and the whole community estate if necessary to pay debts and costs of administration, and advised the executor to that effect (R. 116). There was no necessity to sell any of the assets of the estate to pay debts (R. 117). The respondent and Mr. Parker were advised that respondent's share of the stock would not be affected by the sale to pay bequests (R. 121 and 130). The respondent in no wise approved or consented to any sale of her interest in the stock in 1934 (R. 130).

A petition was presented by the executor and based thereon an order was entered confirming the options and authorizing the sale of 80,000 shares (10,000 sold outright, and 70,000 optioned), based upon the showing "that it is necessary that some part of the personal property of said estate be sold to pay the specific bequests provided in the will herein" (R. 256-260). Five days later a further petition was presented and order entered authorizing the sale of 5,000 additional shares making a total of 85,000 shares sold and optioned (R. 152-154). The testimony shows that there was no change in the intervening period of five days necessitating sale of the additional amount to pay debts or expenses (R. 116). The only purpose of the

sales was to provide funds to pay bequests (R. 110 and 111). While respondent appeared and consented to the sale through Mr. Parker, she did so as residuary legatee, a very natural thing in view of her large interest, and there is nothing to indicate any intent or desire to commit her to a disposition of her own community interest (R. 53-56, 65).

As the petitioner points out in his brief, the debts and claims were comparatively small and there was no necessity for selling assets to pay them (Petitioner's brief 18 and 19).

The estate had a regular income of from \$30,000 to \$35,000 per quarter in dividends from the Sunshine Mining Company stock alone (R. 109), as well as substantial rentals from real property and as the executor's final accounting shows (R. 181) a great deal more cash income from estate properties, and it was wholly unnecessary in fact and not required as a matter of law for the estate to dispose of such stock at that stage of the administration for the purpose of paying costs of administration, or the widow's allowance, or even to pay debts. The sole purpose of the sale as Mr. Hardy testified was "that we were faced with having to pay about one-half a million dollars in bequests" (R. 110).

From the foregoing it is apparent that not only was there no intent to sell any of respondent's stock, but legally it was impossible for the executor to do so. Section 6892 Remington's Revised Statutes (Petitioner's brief p. 28) restricts the right of the husband to bequeath any part of his wife's community interest,

and by Section 1342 such community interest goes to the survivor, subject only to the community debts but not to any testamentary disposition. According to the statutes neither the court nor the executor had any authority to sell the interest of the respondent to pay the bequests, and as a matter of law the sale made for that purpose under the circumstances could relate only to the interest of the deceased.

In addition to the absence of any consent or agreement by respondent to a sale of her interest, there is also affirmative evidence that only the decedent's interest in the stock was being sold. This is clearly shown both by Mr. Brown's testimony and by the following proceeding in the probate court:

After the exercise of the options, and in May of 1935, the executor filed a petition with the court (R. 155) setting forth that 210,974 shares of the Sunshine Mining Company stock came into its hands as executor "of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, shares to the number of 125,974 of which said shares Rose B. Larson, as surviving spouse, is the owner of 105,487," and asking a partial distribution to her of 15,000 shares. The order of the probate court entered May 1, 1935 (R. ¹⁵⁷~~117~~) after reciting the aggregate of 210,974 shares of Sunshine Mining Company stock, further recites that "said Rose B. Larson is entitled, as her share of the community property, to receive from said executor, upon the closing of said estate, the total of 105,487 shares." These show beyond any possibility of doubt

or misunderstanding that the executor and the court understood, intended and believed that they had provided for this sale to be made from the interest of the estate and not from the interest of the respondent.

The action of the probate court and its treatment of the matter as a sale of the interest of the deceased and not of the respondent is determinative and binding so far as this proceeding is concerned.

Helvering v. Rhodes (C.C.A. 8) 117 F. (2d) 109, and cases cited;

Estate of Carrie M. Botts, 42 B.T.A. 977 at 985 and cases cited;

Estate of Geo. M. Balzereit, 46 B.T.A. No. ^{P929}
~~127.~~

The problem involves no difficulty of Federal tax law at all but simply a matter of determining, under the facts and the law applicable to administration of community property, what interest was sold by the executor. The respondent's contention and the decision of the Board is supported not only by the evidence and the record, but is squarely sustained by a decision in a very similar case upon the appeal of *Mildred Hubbard*, 30 B.T.A. 619 (Acq.).

That case involved the estate of petitioner's husband who died December 18, 1928, leaving an amount of corporate stock standing in his name which was community property subject to the laws of the State of Washington. Deceased left a will naming his widow as sole beneficiary and also as executrix under non-intervention provisions, which was admitted to probate on January 15, 1929. The assets of the estate greatly

exceeded the liabilities and it was unnecessary to sell any of the stock to pay debts or expenses. Decree of solvency was entered on April 30, 1929, and no part of the proceeds from the sale hereinafter referred to was distributed to the petitioner prior to that date.

Immediately following the probate of the will, and during January and February of 1929, and acting pursuant to a plan and intent to sell the interest of the deceased in such stock, the petitioner, as executrix of the estate, sold one-half of the entire block owned by the community, plus a small amount for her individual account, and the proceeds of such sale of the one-half interest were credited to her account as executrix in the bank. There was no segregation by transfer of the certificates into the names of either the estate or the petitioner as executrix or individually, but the stock sold was transferred from the name of the deceased to a street name to avoid public knowledge of whose stock was being sold.

In the following year the petitioner made a final report to the probate court to the effect that she had sold the one-half community interest of the deceased in said stock, which was approved by the court.

The Commissioner determined that the petitioner, Mildred M. Hubbard, as survivor and owner of one-half of the community property, was taxable on the profit on one-half of the stock sold by her as executrix for the account of the estate. Upon appeal the Board held that the Commissioner's determination was erroneous. Some question apparently was raised about the validity of the sale, which the Board disposed of

by reference to the powers of an executor under a non-intervention will, thus placing the situation on a par with the instant case where the sale was authorized by order of the court (cf. *Estate of A. E. Larson—Parker v. Hardy, et al.*, 200 Wash. 318 at 335, 93 P. (2d) 431, approving the validity of the sale. The style of this case indicates that none of the parties connected therewith considered Mrs. Larson a necessary party, as would have been the case had they considered that her interest in the stock had been sold).

In the *Hubbard* case the Board pointed to the approval by the court of the report of the executrix of having sold the community interest of the deceased, the equivalent of which occurred in this case in the petition and order for partial distribution (R. 155-157), as recognizing that the sale was made from the decedent's interest, leaving the survivor's share intact. Then, after quoting from *Thatcher v. Capecca*, 75 Wash. 249, 134 Pac. 923, as authority for the proposition that where rights of minors or creditors are not involved a valid partition of the property of an estate may be reached by the agreement of the parties interested without necessity of an order of the probate court, the Board said:

“* * * In the first place it would not be necessary for her to distribute to herself her full portion at one time; neither was it necessary that equal amounts be earmarked as property of the estate and as distributed to herself as a part of her community share. Secondly, and principally, we are not concerned with the portion distributed to petitioner as her community share, but that

part designated and sold as property of the estate of the decedent. * * *”

Then after referring to the executrix's report which, as here, showed that only the deceased's interest had been sold, the Board continued:

“From this, and from other facts established, namely, the detailed steps taken to partition the stock, the sale of it and treatment of the proceeds as property of the decedent, and the approval of the court having jurisdiction, it is difficult to see what more could be needed to make a valid partition. * * *” (30 B.T.A. at 627)

Bearing in mind that in the present case the court gave prior approval to the petition of the executor (not the survivor) for the sale of stock of the estate, which could not legally have been sold for the contemplated purposes, except to the extent of the interest of the decedent therein, and the subsequent report and approval of the transaction as a sale of such interest of the decedent and not of the survivor, we think it constitutes an even stronger case in favor of the respondent's position.

It is certainly no objection or defense to that position that the sale may have been instigated by persons desirous of listing the stock or that the unsold portion of the stock stood to benefit therefrom. Those circumstances merely afforded the opportunity and market for the sale that was made.

Neither does the fact that in the *Hubbard* case the executrix acted under a non-intervention will render that case at all inapplicable. The non-intervention features of such a will do not affect the substantive prop-

erty rights of the estate on the one hand or of the surviving spouse on the other, but only permit the administration of the estate without the necessity of court order or approval. If anything, the fact in this case that the will was not of a non-intervention character and the executor acted under order of the court is more favorable to the respondent's position. In the *Hubbard* case, where the executrix was also the surviving spouse and beneficiary with unrestricted power to deal with the shares in either character, the line of demarcation between the two interests is less clear than in this case where the executor had no legal right to sell the petitioner's share.

The whole consideration is, after all, primarily a question of fact and intent within the limits of the executor's statutory powers and in view of such considerations we submit:

First, that it clearly appears from all of the evidence that there was never any intent by the petitioner here to sell her interest, and that on the contrary, as confirmed by the court, the sale by the executor was intended to relate only to the interest of the deceased; and

Second, that petitioner's interest could not have been affected or sold because it was beyond the power of the executor or the court to do so for the purpose of paying legacies, and it was unnecessary to sell such interest, and in fact it was not sold, for the purpose of paying debts or expenses of administration.

One other factor may be of significance in reaching a proper disposition of this matter. Petitioner's Exhibit 10 (R. 198) is a deficiency letter addressed

to the Estate of A. E. Larson on May 16, 1940, long after the present proceedings were initiated, determining a deficiency against the estate for the period ending December 31, 1934, in which in addition to the net income disclosed by the return, the Commissioner has added the total profit upon the sale of 85,000 shares which he claims was received by and is taxable *entirely to the decedent's interest* upon the identical transaction involved in this proceeding. While perhaps not an estoppel, it would seem at least to be an election, made after full knowledge of the facts, to pursue a claim which is absolutely inconsistent with that asserted in this proceeding and which should constitute a waiver of petitioner's position here (See R. 201; Refer amended petition R. 34 and 35). The petitioner has made a deliberate choice in his later inconsistent assertion of claim against the estate of A. E. Larson, which should be held to constitute a waiver of his claim respecting the same transaction in this case.

Certainly respondent's assertion of deficiency against the estate of A. E. Larson, treating the sale as made entirely from decedent's interest, which is completely at variance with his position in this case, evidences his lack of faith in this proceeding, and substantiates the contention of the respondent and decision of the Board that no part of her community interest was included in the sale of 85,000 shares.

The decision should be affirmed.

Respectfully,

H. B. JONES,

Attorney for Respondent.

United States
Circuit Court of Appeals

For the Ninth Circuit.

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Transcript of Record

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States for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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723 Pittock Block, Portland, Oregon, and

JOHN SCOBLE,

55 Liberty Street, New York,

for Appellee, and Cross-Appellant.

In the District Court of the United States
for the District of Oregon

July Term, 1937.

Be it remembered, that on the 22nd day of September, 1937, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit: [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Oregon

In Equity No. E9641

RICHARD HOWELL,

Plaintiff,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Defendants.

AMENDED BILL OF COMPLAINT

Comes now the plaintiff and for cause of suit
against the defendants herein alleges as follows:

I.

That plaintiff is a citizen and resident of the
State of Connecticut and is one and the same per-
son as Richard Howell Busck, a son of Charlotte
Howell Deady, who is named in the last will and
testament of the said Charlotte Howell Deady as
her sole legatee and devisee, all of which more fully
appears from the last will and testament of the
said Charlotte Howell Deady hereinafter set out.

II.

That the defendants, Matthew Edward Deady
and Hanover Deady, are citizens and residents of
the State of Oregon.

III.

That the defendant, The First National Bank of Portland, is a national banking association organized and existing under the national banking laws of the United States of America with its office and principal place of business in the City of Portland, State of Oregon. [2]

IV.

That the controversy herein involves money and property rights exclusive of interest and costs of a value in excess of \$3,000.00.

V.

That on and before the 29th day of August, 1923, the said Lucy A. H. Deady was seized in fee of the following described real property located and situated in the City of Portland, County of Multnomah, State of Oregon, to wit:

Lot One (1), Block Two Hundred and Twelve (212) City of Portland, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That on or about said date the said Lucy A. H. Deady died leaving a last will and testament wherein and whereby she devised an undivided two-thirds of said real property, subject to certain conditions, charges and restrictions, to Henderson Brooke Deady, her son, and an undivided one-third thereof to her grandsons, the defendants Matthew Edward

Deady and Hanover Deady; that said will was duly and regularly proved, admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, on the 5th day of September, 1923; that letters testamentary issued out of said court on the 15th day of September, 1923, to Joseph Simon and Henderson Brooke Deady as executor of the last will and testament of the said Lucy A. H. Deady, deceased, and administration of the estate of the said Lucy A. H. Deady was had thereunder; that said estate was closed and the executor discharged on the 6th day of March, 1936; that said last will and testament of the said Lucy A. H. Deady in words and figures is substantially as follows, towit:

In The Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say: [3]

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment to each of my grandsons,—Matthew Edward Deady and Hanover Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid

therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons here-

inbefore named, and I give and devise the same to my said grandsons. [4]

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall *contue* for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my

grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees named herein, the Security Savings and Trust Company, of Port-

land, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made.

In witness whereof, I have hereunto set my hand and seal this the 29th., day of July, A. D. 1920, at Portland, Oregon.

(Signed) LUCY A. H. DEADY (Seal) [5]

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) CHESTER V. DOLPH
Residing at Portland, Or.

(Signed) J. V. BEACH
Residing at Portland, Or.

That plaintiff is informed and believes and therefore alleges that at the time of the death of the said Lucy A. H. Deady said real property, constituting the major portion of her estate, was profitably leased for a long period of years and was yielding substantial revenue; that plaintiff is informed and believes and therefore alleges that said lease is still in existence and has yet a number of years to run and that said property is now and ever since the death of the said Lucy A. H. Deady has been yielding revenues in excess of \$15000 per annum.

VI.

That the said Henderson Brooke Deady died without issue on or about the 28th day of May, 1933, leaving a last will and testament wherein and whereby he devised and bequeathed all of his property, real and personal, to his wife, Charlotte Howell Deady; that a copy of the last will and testament of the said Henderson Brooke Deady is marked Exhibit A, hereto attached and made a part hereof; that said last will and testament was, on the 18th day of July, 1933, duly and regularly proved and admitted to probate in the Circuit Court of Multnomah County, State of Oregon, Department of Probate, and administration of said estate commenced thereunder by letters dated July 18, 1933, appointing Robert H. Strong as executor thereof, who thereafter and on the 18th day of July 1933, duly qualified and became such executor.

VII.

That the said Charlotte Howell Deady died on or about the 12th day of July, 1935, leaving a last will and testament wherein and whereby she devised and bequeathed all of her [6] property, real, personal and mixed, of which she died seized, to the plaintiff, her son, otherwise known and named in said will as Richard Howell Busck; that a copy of said last will and testament of the said Charlotte Howell Deady is marked Exhibit B, hereto attached and made a part hereof; that on the 22nd day of July, 1935, said last will and testament of

the said Charlotte Howell Deady was duly and regularly proved and admitted to probate in the State of Connecticut and that on said date the plaintiff herein was appointed and qualified as executor of the said last will and testament of the said Charlotte Howell Deady as appears from the certified copy of the order of court, marked Exhibit C, hereto attached and made a part hereof.

VIII.

That there exists between the plaintiff and defendants herein an actual bona fide and justiciable controversy within the meaning of the provisions of T. 28 U.S.C.A. #400, which said controversy involves the construction and legal interpretation of the said last will and testament of the said Lucy A. H. Deady and depends for its determination upon a judicial declaration of the legal rights of this plaintiff thereunder; that the said controversy is substantially as follows:

(a) That the plaintiff, as successor in interest by successive testamentary devises of Henderson Brooke Deady as hereinbefore alleged, claims and asserts that he is the owner in fee of an undivided two-thirds of said Lot 1, Block 212, Portland, Oregon, and is entitled to two-thirds of the rents, profits and income therefrom, subject only to a charge thereon for payment of the legacies and annuities in said will contained from and after the 12th day of July, 1935, being the date of the death

of Charlotte Howell Deady from whom the plaintiff [7] has inherited.

It is the specific contention of plaintiff that paragraph 3 of the said last will and testament of **Lucy A. H. Deady** constitutes a testamentary gift in fee simple absolute and that the "conditions, provisions and charges" to which said devise is made subject, relate only to the conditions, charges and provisions contained in paragraphs fifth, sixth and ninth of said will to which the testamentary gift to defendants **Matthew Edward Deady** and **Hanover Deady** are likewise subject; that paragraph seventh of said will is not to be construed as any limitation on or reduction of the fee estate devised to **Henderson Brooke Deady** in paragraph 3; that the said paragraph seventh relates to and was applicable only on the contingency of the death of **Henderson Brooke Deady** prior to that of **Lucy A. H. Deady**; that this contingency did not occur and **Henderson Brooke Deady** became seized on the death of **Lucy A. H. Deady** of an estate of inheritance which he devised on his death to his widow, **Charlotte Howell Deady**, and which she, the said **Charlotte Howell Deady**, devised to this plaintiff, the said rightful owner thereof; that if paragraph seventh of the last will and testament of **Lucy A. H. Deady** did not refer to the contingency of the death of **Henderson Brooke Deady** prior to the death of the testatrix, it only provided for an executory devise to the two grandsons of **Lucy A. H. Deady** in case **Henderson Brooke Deady** died without issue; that the pro-

visions of said paragraph seventh of said last will and testament and said executory devise, contained therein, are invalid and void under the rule as to perpetuities.

That the defendants contend that under said will there was devised to the said Henderson Brooke Dedy a fee estate condition on his, the said Henderson as Henderson Brooke Dedy died without much as Henderson Brooke Dedy died without issue [8] said devise lapsed and Henderson Brooke Dedy acquired only a life estate with power to appoint his wife to succeed him for her lifetime in the enjoyment of two-thirds of the income therefrom; that consequently Charlotte Howell Dedy succeeded to only a life interest in two-thirds of the income from said estate of Lucy A. H. Dedy and had no estate of inheritance therein which she could devise or bequeath to the plaintiff.

(b) That the plaintiff further contends that the said defendant, the First National Bank of Portland, is without authority to manage said property and collect and disburse the profits and income therefrom since its discharge as executor of the estate of Lucy A. H. Dedy; that said right so exercised by the defendant, The First National Bank of Portland, is an incident of ownership and therefore accrues to the devisees or their successors upon the distribution of the property to them and the discharge of the executor; that the said last will and testament of the said Lucy A. H. Dedy does not create a valid or any trust since there is no

trust res conveyed to, settled upon, or vested in any person or persons for the benefit of another, and that the use of the word "trustee" in the last paragraph of said will in the absence of any language creating a trust is not sufficient to vest any persons or corporation therein named as "trustees" with any property, interest, title or right sufficient to constitute said persons as trustees or to clothe them with the power and authority of a trustee; that consequently the management of said real property by the defendant, The First National Bank, and the collection and disbursement of the income therefrom, is an invasion of the plaintiff's property rights and has resulted and will continue to result in pecuniary damage to plaintiff in a substantial amount.

(c) That plaintiff further contends that paragraph [9] sixth of said will is invalid, void and of no force and effect insofar as it purports to impose a limitation on the power of the devisees in said will named and their successors to partition, encumber or alienate the real property therein named and involved herein for an absolute period of twenty-five years after the death of the testatrix: that such attempted and purported limitation violates the rule against perpetuities and therefore must fail. That defendants assert and claim that said paragraph is valid and subsisting.

(d) That the plaintiff further contends that paragraph fifth of said will is invalid and void and without force or effect, under the rule as to per-

petuities, for the reason that the provision contained therein "That from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1,000.00 or more than \$2500.00 per year, in discretion of my executors, for the purpose of retiring and paying off the mortgage debt created and existing against said lot numbered 1 Block numbered 212", provides for the accumulation from the income from said property, for more than lives in being, at the time of the death of the testator, plus twenty-one years. That said provision being invalid, void and of no effect, the provision for the payment of any legacies whatsoever, from the income from said estate, is also invalid and void.

IX.

That on or about the 14th day of February, 1934, one Joseph Simon, surviving co-executor and pretended "trustee" of the estate of Lucy A. H. Deady, died and the defendant, the [10] First National Bank of Portland thereupon and to-wit, the 27th day of February, 1934, was appointed and qualified as executor thereof and continued as such until the 6th day of March, 1936, when said estate of the said Lucy A. H. Deady was closed and the defendant, The First National Bank of Portland,

was discharged as executor thereof; that said defendant The First National Bank, ever since has and now does manage, operate and control the said real property first hereinabove described, and ever since has continued to and now does collect, receive and disburse the income therefrom as the pretended "trustee" of said estate; that said defendant The First National Bank of Portland, is without any lawful right or authority to so manage, control and operate said real property and to collect, receive and disburse the income and rentals therefrom and its acts in so doing are contrary to and in violation of the property rights of this plaintiff.

That the exact amount of moneys received by the defendant The First National Bank of Portland, since the said 6th day of March, 1936, and the disposition thereof by said defendant is to this plaintiff unknown, and plaintiff cannot ascertain and determine these matters without benefit of a discovery of and an accounting therefor; that plaintiff is informed and believes and therefore alleges that a substantial portion of said income has been and is being paid over to the defendants Matthew Edward Deady and Hanover Deady by the defendant The First National Bank of Portland; that plaintiff has made demand upon each of the defendants herein for an accounting of said income and profits from said real property and for payment to him, plaintiff, of his proportionate share thereof; that said defendants, and each of them, have wholly failed, neglected and refused to render an account-

ing to this plaintiff and [11] still do refuse to do so, and have wholly failed, neglected and refused to pay over to this plaintiff his proportionate share thereof or any moneys whatsoever and still do refuse to do so; and the defendants, and each of them, have denied and ignored and still do deny and ignore plaintiff's rights therein and thereto; that the defendant The First National Bank, has announced its intention to continue to manage, operate and control said real property and to collect, receive and disburse the rents and profits therefrom to the exclusion of plaintiff's interest and rights therein, and the defendants, Matthew Edward Deady and Hanover Deady, have announced their intention to continue to receive from the defendant The First National Bank of Portland the entire net income from said estate to the exclusion of plaintiff's rights and interests therein; that the defendants, Matthew Edward Deady and Hanover Deady, are without any appreciable income or assets other than their interest in the real property above described; and plaintiff is informed and believes that said defendants Deadys have dissipated and spent the moneys heretofore paid to them by the said defendant The First National Bank, and will continue to dissipate and spend the moneys paid to them by said defendant The First National Bank and are therefore and would be unable to respond in damages to this plaintiff.

That the acts of the defendants hereinabove alleged violate and invade the property rights of this

plaintiff and unless enjoined and restrained will continue so to do, all to the irreparable injury and damage of plaintiff; that in order to preserve and protect the property here involved and hold and maintain the income therefrom safe and secure pending the determination of the issues herein, it is necessary that a receiver be appointed, or in the alternative that the court [12] impound said income derived and to be derived from said property in the hands of said defendant The First National Bank under the supervision and orders of this court.

X.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays:

1. That subpoenas issue herein directed to the defendants above named and each of them requiring said defendants and each of them to appear herein and true answer make to the allegations in this Amended Bill of Complaint contained.

2. For a decree of this court construing the last will and testament of Lucy A. H. Deady, and

- (a) Declaring that in and by paragraph Third of the last will and testament of Lucy A. H. Deady, deceased. Henderson Brooke Deady became vested in fee simple absolute in two-thirds of Lot numbered 1, in Block numbered 212, in the City of Portland, Oregon.

- (b) Declaring that by virtue of the devise and bequest of said interest in said property, from Hen-

derson Brooke Deady to Charlotte Howell Deady and the devise and bequest of said property by Charlotte Howell Deady to the plaintiff herein, said plaintiff is now the owner in fee simple of said two-thirds interest in Lot numbered 1 in Block numbered 212 of the City of Portland, Oregon.

(c) Declaring that paragraphs fifth, sixth, eighth and ninth of the last will and testament of Lucy A. H. Deady, deceased, are invalid and void.

(d) Declaring that paragraph seventh of the last will and testament of Lucy A. H. Deady provided for the contingency of the death of Henderson Brooke Deady prior to the death of the testatrix. That Henderson Brooke Deady died [13] after the death of Lucy A. H. Deady.

(e) Declaring that if paragraph seventh of said last will and testament did not provide for the contingency of the death of Henderson Brooke Deady prior to the death of Lucy A. H. Deady, that at the most, it was an executory devise only, and was invalid and void under the rule as to perpetuities.

(f) Declaring the plaintiff to be the true owner in fee simple absolute of an undivided two-thirds of Lot 1, Block 212, City of Portland, and to be immediately entitled to the joint control, management and operation thereof with the defendants Matthew Edward Deady and Hanover Deady, and to two-thirds of the income therefrom less such testamentary charges and legacies as the court may find to exist at the date of its decree.

(g) Declaring the defendant The First National Bank of Portland to be without lawful or any right to manage, operate or control, or to interfere with the management, operation or control of said real property, or to collect and receive or disburse any of the income therefrom, as trustee or in any other capacity whatsoever, and perpetually enjoining and restraining said defendant The First National Bank from continuing so to act.

(h) Appointing a receiver to assume the management, operation and control of said real property and to collect and receive and hold the rents, profits and income from said real property, subject to the orders and supervision of this court pending the final disposition of this cause, or, in the alternative, impounding in the hands of the defendant The First National Bank all moneys derived from said real property, or which might be derived therefrom during the pendency of this cause, and restraining and enjoining the defendant The First [14] National Bank from paying out or disbursing any of said money except as may be specifically ordered by the court or stipulated and consented to by the plaintiff.

(i) Declaring and decreeing the limitations on the power and disposition of said real property as contained in clause Sixth of said will to be invalid and of no force and effect.

(j) Declaring and decreeing that the direction for the accumulation of a sinking fund from the income of the property for the payment of the

mortgage, contained in said last will and testament of Lucy A. H. Deady is invalid and void under the rule as to perpetuities.

(k) Declaring and decreeing that paragraphs fifth, sixth, eighth, and ninth of said last will and testament are invalid and void.

(l) Ordering, directing and decreeing a full and complete discovery of the facts referred to herein and requiring defendants and each of them to render herein a true and correct accounting of all the moneys which they or either of them have received as income from the said Lot 1, Block 212, City of Portland, since the decease of Charlotte Howell Deady, being the 12th day of July, 1935.

(m) Awarding to this plaintiff judgment against the defendants and each of them for two-thirds of the income from said real property, since the said 12th day of July, 1936, less proper deductions for payment of indebtedness, taxes, legacies, expenses of administration and other costs which, after the accounting is had herein, may appear to the court to be just and proper charges to be deducted from plaintiff's share of said income.

(n) Awarding to the plaintiff his costs and [15] disbursements herein.

3. For such other and further relief as to the court may seem just and equitable.

JOHN SCOBLE

55 Liberty Street, New York

MAGUIRE, SHIELDS & MORRISON

Attorneys for Plaintiff [16]

EXHIBIT A

LAST WILL AND TESTAMENT

I, Henderson Brooke Deady, of the City of Portland, State of Oregon, being of sound and disposing mind and memory, do make, publish and declare the following to be my Last Will and Testament, hereby revoking all other and former wills by me at any time made.

First: I nominate and appoint Robert H. Strong of the City of Portland, State of Oregon, sole executor of this, my Last Will and Testament, and direct that no bond of any sort shall be required of him.

Second: I give, devise and bequeath unto my beloved wife, Charlotte Howell Deady, all my property, real and personal, of every name, nature and kind, wheresoever the same may be situated.

Third: Under Paragraph 8 of the Last Will and Testament of my beloved mother, Lucy A. H. Deady, executed the 29th day of July, 1920, I am authorized and permitted to bequeath by my Last Will and Testament to my wife, the income which would be derived by me, if living, from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term of her natural life. I now, under and by virtue of said Paragraph 8 of my said beloved mother's will, bequeath said income from said two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, to my beloved wife, Charlotte Howell Deady, for and during the term of her natural life, and nominate and consti-

tute her my appointee under said Paragraph 8 of the said will of Lucy A. H. Deady.

In witness whereof, I have hereunto set my hand and seal this 22d day of October, 1932.

HENDERSON BROOKE DEADY (Seal)

The above and foregoing was duly signed, sealed, published and declared by the said Henderson Brooke Deady to be his Last Will and Testament, in our presence, and we and each of us in his presence and in the presence of each other and at his request signed our names as witnesses thereto on the date therein named and the said Henderson Brooke Deady was at said time, in our opinion, of sound and disposing mind and memory and free from restraint of any sort.

Names	Addresses
RALPH C. DODD	New Milford, Conn.
JOHN S. ADDIS	New Milford, Conn.

[17]

EXHIBIT B

I, Charlotte Howell Deady, of New Milford, Connecticut, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other and former wills by me made.

First: I do hereby order and direct that all of my just debts and funeral expenses be paid out of my estate as soon after my decease as possible.

Second: I give, devise and bequeath unto my beloved husband, Dr. Henderson Brooke Deady, all my estate, real, personal and mixed, wheresoever situated, absolutely and forever.

Third: If my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I give, devise and bequeath unto my son, Richard Howell Busck, also known as Richard Howell, my farm in New Milford, Connecticut, consisting of house, **barn and** approximately sixty acres (60) of land, and all the contents and furnishings of said house and machinery and apparatus and stock and poultry on said farm.

Fourth: In case my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I further give, devise and bequeath unto my beloved son, Richard Howell Busck, also known as Richard Howell, all my other property, real, personal and mixed, wheresoever situated and of any kind or nature whatsoever, including all money which I may have in any bank or banks at the time of my decease, also all notes, bonds, and stocks, and bonds and mortgages owned by me at the time of my de-

cease, and all debts which may be owing to me at said time.

Fifth: I make no provision for my daughter, Karen Busck, in this, my Last Will and Testament, because she has arrived at her majority and has received her education and is self supporting.

Sixth: I nominate, constitute and appoint Dr. Henderson Brooke Deady to be executor of this, my Last Will and Testament; if my said beloved husband, Dr. Henderson Brooke Deady, should predecease me, I nominate, constitute and appoint my beloved son, Richard Howell Busck, also known as Richard Howell, to be executor of my Last Will and Testament, and direct that no bond or other security be required of either of them for the faithful performance of their duties.

In witness whereof I have hereunto set my hand and seal this fourth day of May, in the year One Thousand Nine Hundred and Thirty-three.

CHARLOTTE HOWELL DEADY (Seal)

Witnessed by:

JOHN M. SCOBLE

MARIVA INGLING

N. COURTENAY JOHNSTON

The foregoing instrument was subscribed, sealed, published and [18] declared by Charlotte Howell Deady, the testatrix above named, as and for her Last Will and Testament, in the presence of each of us, who, at her request, in her presence and in

the presence of each other, have hereunto subscribed our names as witnesses the day and year above written.

MARIVA INGLING

residing at 259 Edward St., Ridgewood, N. J.

K. COURTENAY JOHNSTON

residing at 461 West 22 Street, City of New York

JOHN M. SCOBLE

residing at 988 Lincoln Place, Brooklyn, N. Y.

[19]

EXHIBIT C

At a Court of Probate holden at New Milford,
within and for the District of New Milford, on
the 22nd day of July, 1935.

Present, John S. Addis, Judge.

Estate of Charlotte Howell Deady, late of New Milford, in said District, deceased.

This court finds that all parties known to be interested in said estate have signed and filed in this Court a written waiver of the notice of the hearing upon the application for the probating of an instrument purporting to be the last will and testament of said deceased, and said waiver is accepted and ordered to be recorded.

After hearing, this Court finds that the above named deceased was domiciled at the time of her death in the town of New Milford in said District,

that she died on the 12th day of July, 1935, leaving an instrument in writing purporting to be her last will and testament, that said instrument was duly executed by the said deceased as her last will and testament and that she was at the time of executing the same of lawful age and of sound mind and memory. It is therefore considered by this court that said will is duly proved and the same is approved, allowed and ordered to be recorded.

And Richard Howell, of New Milford, Conn., having been named in said will as Executor thereof, this court therefore appoints said Richard Howell as Executor of the last will and testament of said deceased, and said Richard Howell, on said day, appeared in court, accepted said trust, and gave a probate bond, with sufficient surety, in the sum of One Thousand (1,000) Dollars, which bond is approved, accepted and ordered to be recorded.

JOHN S. ADDIS

Judge. [20]

United States of America,
District of Oregon—ss.

I, Robert F. Maguire, first duly sworn on my oath depose and say that I am one of the attorneys for the plaintiff herein; that plaintiff is a citizen and resident of the State of Connecticut and is not within this jurisdiction at the time of the filing of this amended complaint; that I am possessed of information from which I have prepared the fore-

going amended bill of complaint; that the matters and things therein alleged are true of my own knowledge except as to those matters therein alleged on information and belief and as to them I verily believe them to be true.

ROBERT F. MAGUIRE

Subscribed and sworn to before me this 30th day of January, 1937.

[Seal]

HELEN HRUBY

Notary Public for Oregon.

My commission expires July 19, 1940.

[Endorsed]: Filed September 22, 1937. G. H. Marsh, Clerk, By F. L. Buck, Chief Deputy. [21]

. —————

And Afterwards, to wit, on the 12th day of October, 1937, there was duly Filed in said Court, a Motion to Dismiss Amended Complaint, in words and figures as follows, to wit: [22]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT

Come Now the defendants above-named and move the Court to dismiss plaintiff's Amended Complaint herein on the following grounds:

(1) Said Amended Complaint does not state facts sufficient to constitute a valid cause of suit or action against them.

(2) It appears upon the face of said Amended

Complaint that the suit has not been commenced within the time required by law.

SIMON, GEARIN, HUMPHREYS & FREED
EDGAR FREED

Attorneys for Defendants

I, Edgar Freed, one of the attorneys for the defendants, hereby certify that in my opinion this Motion is well founded in law. It is the contention of the defendants that it appears from the face of the Amended Complaint that the plaintiff has no interest in the property in question; and it is the further contention of the defendants that this proceeding is, in effect, a contest of the will of Lucy A. H. Deady, Deceased, and it appears from the face of said Amended Complaint that the suit was not brought within one year after the probate of said will, as required by Section 11-207, Oregon Code 1930; and it is the further contention of the defendants that, in any event, it appears upon the face of said Amended Complaint that this suit was not commenced within ten years after the alleged cause of suit accrued, as required by Sections 6-103 and 1-202, Oregon Code 1930.

EDGAR FREED [23]

State of Oregon,
County of Multnomah—ss.

Due service of the within Motion to Dismiss Amended Complaint is hereby accepted in Multnomah County, Oregon this 12th day of October,

1937 by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendants.

MAGUIRE, SHIELDS & MORRISON
Attorneys for Plaintiff

[Endorsed]: Filed October 12, 1937. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [24]

And afterwards, to wit, on the 27th day of October, 1938, there was duly Filed in said Court, Objections to Application of the New Rules of Civil Procedure, in words and figures as follows, to wit:

[25]

[Title of District Court and Cause.]

OBJECTIONS TO APPLICATION OF THE NEW RULES OF CIVIL PROCEDURE

Come now the plaintiff and defendants and jointly object to the application of the new rules of civil procedure to the above entitled case on the grounds and for the reason that there is now pending before the court a motion to dismiss properly drawn and presented to it under the old rules and raising a determinative point in this case which should be decided by the court as presented under the old rules of federal procedure which were in effect at the time the motion was presented and argued to the court, plaintiff and defendants therefore request that the court make an order withholding the application of the new rules of civil procedure as pro-

mulgated by the Supreme Court of the United States for District Courts until determination of the motion to dismiss now before the court is made and apply to its determination the rules of federal procedure in existence prior to September 16, 1938.

ROBERT F. MAGUIRE

of attorneys for Plaintiff
Public Service Building
Portland, Oregon

EDGAR FREED

Of attorneys for defendants
Failing Building
Portland, Oregon

[Endorsed]: Filed October 27, 1938. G. H. Marsh,
Clerk. By H. S. Kenyon, Deputy. [26]

And Afterwards, to wit, on Thursday, the 27th day of October, 1938, the same being the 99th Judicial day of the Regular July, 1938, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [27]

[Title of District Court and Cause.]

**ORDER SUSPENDING APPLICATION
OF NEW RULES OF PROCEDURE**

The objection of plaintiff and defendants to the application of the new rules of civil procedure for the district courts of the United States as promul-

gated by the Supreme Court of the United States coming on regularly to be heard, and it appearing therefrom that an issue which may be determinative of the case has been presented to the court under the former rules of procedure and that the determination of the same is now pending awaiting briefs of the respective parties and that the application of the new rules would not be feasible to the determination of said motion. It is, therefore

Ordered that the application of the new rules of civil procedure for the District Courts of the United States as promulgated by the Supreme Court of the United States shall be and is hereby suspended in this case until said motion to dismiss the same shall have been determined by this court.

Dated October 27th, 1938.

JAMES ALGER FEE

Judge

[Endorsed]: Filed October 27, 1938. G. H. Marsh, Clerk, By H. S. Kenyon, Deputy. [28]

And Afterwards, to wit, on Monday, the 6th day of November, 1939, the same being the 1st Judicial day of the Regular November, 1939, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [29]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

The motion of defendants to dismiss plaintiff's amended complaint coming on regularly to be argued before the above entitled court, plaintiff appearing by Robert F. Maguire and Donald K. Grant of his attorneys, and defendants appearing by Edgar Freed and C. C. Carlson of their attorneys, said motion was argued to the court, the court taking the same under advisement and now being fully advised in the premises and having rendered its opinion herein and being of the opinion that said motion is not well taken, it is therefore

Ordered that defendants' motion to dismiss be, and the same is hereby, denied.

Dated this 6th day of November, 1939.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 6, 1939. G. H. Marsh, Clerk, by H. S. Kenyon, Deputy. [30]

And Afterwards, to wit, on the 1st day of December, 1939, there was duly Filed in said Court, an Opinion on Motion to Dismiss, in words and figures as follows, to wit: [31]

[Title of District Court and Cause.]

OPINION

November 6, 1939

James Alger Fee, District Judge:

A motion to dismiss was filed against a complaint filed by Richard Howell, as legatee of Charlotte Howell Deady, seeking an accounting against The First National Bank, by substitution a trustee, and Matthew Edward Deady and Hanover Deady as to certain income from real property devised under the will of Lucy A. H. Deady, deceased.

The will is set forth in the complaint and reads as follows:

“In the Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the later Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in **Riverview Cemetery**.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon. [32]

Fourth: Subject to like conditions, provi-

sions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment to each of my grandsons,—Matthew Edward Deady and Hanover Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divi-

sions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons. [33]

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-Third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two-thirds thereof, and to Matthew Brooke Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees herein named, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made. [34]

In Witness Whereof, I have hereunto set my hand and seal this the 29th., day of July, A. D. 1920, at Portland, Oregon.

(Signed) Lucy A. H. Deady (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) Chester V. Dolph
Residing at Portland, Or.

(Signed) J. V. Beach
Residing at Portland, Or."

The complaint sets out certain salient facts which are outlined below. Lucy A. H. Deady made this will in 1920, at which time she was owner in fee simple of the real property in question. She died August 29, 1923. Henderson Brooke Deady married Charlotte Howell Deady and died without issue May 28, 1933. His wife died July 12, 1935. Plaintiff is her son and heir. The estate of Lucy A. H. Deady was closed March 6, 1936. The Bank has been acting as sole trustee by substitution after the death of the two trustees named in the will.

In the construction of a will dealing with realty situate in Oregon, the federal court must follow

rules of property established by the highest court of that state.¹ If the Supreme Court of Oregon have not spoken, then the federal court must, in the determination of the instant case, follow the principles which the state court would have applied if the cause had been presented there.² Great weight has been given in all opinions [35] by the Supreme Court of Oregon to the statutory rule that the polestar of interpretation of a will is the intention of the testator.³ The various canons of construction applied at common law or in other jurisdictions have, on that account, been less rigidly followed in this state, despite the theory that canons furnish a formalistic guide to the intention of the testator where it is not clear from the context. For although the language of a testament is usually not that of the testator, but rather that of a technical draughtsman which may not reflect the actual intent of the maker, all the context of the document is considered⁴ by that court to find the intention reflected by the artificial language.⁵ The canons are often dis-

1. *Clarke vs. Clarke*, 178 U. S. 186. 191; *Barber vs. Pittsburg, Fort Wayne & Chicago Railway Co.*, 166 U. S. 83.

2. *Erie Railway Co. vs. Tompkins*, 304 U. S. 64.

3. *Oregon Code* 1930, Sec. 10-531; *Stubbs vs. Abel*, 114 *Oregon*, 610, 619; *Love vs. Walker*, 59 *Oregon*, 95, 107; *Bilyeu vs. Crouch*, 96 *Oregon* 66, 69.

4. *Bilyeu vs. Crouch*, *supra*, 69; *Gildersleeve vs. Lee*, 100 *Oregon*, 578; *Fields vs. Fields*, 139 *Oregon*, 41; *Rose City vs. Langloe*, 141 *Oregon*, 242, 244;

5. See *Stubbs vs. Abel*, *supra*.

cussed, but generally an attempt is made in each instance to discover from indicia the actual intention of the maker.

The intention of the testatrix in the will at bar is not clear, except in certain features. She unquestionably intended to control her property for a long period of time after her death. However, she also intended to give specific items of the property to her sons and grandsons, subject to this control.

The third subdivision of the will Mrs. Deady gave two-thirds of Lot No. 1 to Henderson Brooke Deady. By the fourth paragraph she gave the remaining one-third of Lot 1 to Matthew Edward Deady and Hanover Deady. The gift to Henderson Brooke Deady is "subject to the conditions, provisions and charges thereon hereinafter made", and that to Matthew Edward Deady and Hanover Deady is "subject to like conditions, provisions and charges thereon". The words of gift in each of these two [36]

separate devises are couched in similar language and should be given like effect as to the time of the investment of the respective devisees with title and as to the character of the interest given. It must be concluded as to each parcel the testatrix was intending to convey a fee title," and that the language conveying this intention is direct and posi-

6. "Heirs" or other words of inheritance are not necessary to convey an estate in fee simple. Oregon Code 1930, Sec. 63-105; See *Palmateer vs. Reid*, 121 Oregon, 179, 184, 185.

tive. The fee in each instance was subject to the stipulations expressly mentioned which now must be discussed.

In Oregon, by interpretation of a statute,⁷ reinforced by the common law rule, where an estate in fee is given in one clause of a will in clear and explicit terms the interest which the devisee thus obtains cannot be taken away or diminished by any subsequent vague or general expression of doubtful import or by any inference deducible therefrom that may be repugnant to the estate given.⁸ It must then be concluded that the "conditions, provisions and charges" were mentioned, not for the purpose of diminishing the fee title expressly given in either instance, but for the purpose of subjecting that title to the "charges" contained in the fifth subdivision, to the "provision" also contained in that item for the creation of a sinking fund to pay a mortgage on the real estate, and to the "condition" contained in the sixth subdivision to the effect that "the devises to my said son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady contained in items three and four thereof are upon the express condition that said property [37] shall not be disposed of or encumbered during the period" of twenty-five years.

7. Oregon Code 1930, Sec. 10-528; *Imbrie vs. Hartrampf*, 100 Oregon, 589, 595; *Irvine vs. Irvine*, 69 Oregon, 187, 190.

8. *Friswold vs. United States National Bank of La Grande*, 122 Oregon, 246, 251.

Nothing is said about other disposition of the title on any contingency whatsoever.⁹ If there had been, the fee given to the grandsons would not have been subjected to a like limitation because their title was absolute. These clauses have no reference whatever to the seventh paragraph which carries a further disposition relating to the portion given to Henderson Brooke Deady alone. The inference to be drawn from the language so far considered is that a fee simple absolute was given to each parcel at the time of the death of Mrs. Deady, subject only to these stipulations so specifically mentioned.

The contest here arises because of this seventh item of the will, which is imbedded among a series of provisions relating to the disposition of the income from the real property and not to the title and at a point where one might expect a clause dealing with the disposition of the income upon the death of her son. This clause reads as follows:

“That in the event my son Henderson Brooke Deady die without issue the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.”

9. See *Stubbs vs. Abel*, *supra*, 633. The clause was “subject to such disposition as I may hereinafter make of any portion thereof.” If the reference to the provisions of the seventh paragraph of the will were direct and positive, the rule as to cutting down the fee would be weakened in application.

If this provision had been clear and direct and made the fee given to Henderson Brooke Deady determinable on some event in the future, full effect would have been given to it, notwithstanding the language of clause three.¹⁰ The draughtsman could have easily framed the wording so as to remove all doubt. As the will reads now, however, the construction is doubtful [38] in three respects, (1) whether the fee was to be cut down, (2) when the devise over was to take effect, (3) whether definite or indefinite failure of issue was meant.

The first question as to whether the fee was to be cut down is cardinal. The indications from the first paragraphs are strongly that it should not be and that the son was vested with fee simple title, as has been noted.

The position of this clause and the language thereof do not make a contrary intent clear, but serve only to introduce confusion. Controversies innumerable have been waged over the words "die without issue". The construction thereof has changed according to time, the jurisdiction, the statutory background and public policy during the last one hundred fifty years. The task devolves upon this court, then, of fixing a date of distribution as to this particular interest in the real property and of determining whether an executory devise based upon that date of distribution can be

10. See *Imbrie vs. Hartrampf*, *supra*, 598, 601; *Stubbs vs. Abel*, *supra*, 631-2. *Rowland vs. Warren*, 10 Oregon, 129, 131.

carried out in view of the public policy of the state of Oregon. In this phrase there are the second and third potential foundations for controversy, the effective time of death and the meaning of "issue".

As to the effective time of death, it is possible that a testator may have meant the gift over to take effect on "death at any time" of the first donee. Again, the maker of the will may have so designated an "intermediate date" that the gift over would take effect, if at all, dependent upon an event which might happen after the death of the maker, but not necessarily after the death of the primary donee. Finally, the testator may have meant that the devise should take effect, as a "substitutional" gift, upon the happening of an event before his own death or not at all.

As to the third potential controversy, the Oregon Supreme Court has apparently adopted the rule that an executory devise [39] based upon indefinite failure of issue is void.¹¹ If, then, that court would construe the words "died without issue" to mean a limitation based upon an "indefinite failure of issue" as do many American courts, where no statute controls, the gift over to the grandsons would be avoided.

A gift to "issue" is usually construed to include all of the lineal descendants of the ancestor. Death without issue at common law was construed to mean an "indefinite failure to issue" until the rule was changed by statute of England in 1837. The common

11. *Imbrie vs. Hartrampf*, *supra*, 599.

law rule was followed generally in the United States up until about 1850, when statutes construing these words, to import "definite failure of issue", were adopted in many states, and in some states the same result was reached by judicial construction.¹³ In a few jurisdictions where there is no statute, the common law rule is still adhered to,¹⁴ although violent criticism of the doctrine and its introduction on American soil has been made.¹⁵ In some states, of which Oregon is one, a grant of a fee tail is construed as a fee simple.

An executory devise based upon an "indefinite failure" is, generally speaking, void. To escape this common law construction of these words as importing "indefinite failure of issue", many American courts adopted the device of construing "die without issue" to mean the death of the primary donee in the life of the testator and the gift over as "substitutional" in character. [40] Therefore, if the first taker outlived the testator, he took in fee.

These shifting principles and the application thereof in Oregon, with great emphasis upon the

12. Warren, "Gifts Over On Death Without Issue", 39 Yale Law Journal, 332.

13. Moore vs. Moore, 51 Kentucky, 651.

14. Huxford vs. Milligan, 50 Indiana, 542; Mercantile Trust Co. vs. Adams, 95 Arkansas, 333; McCarthy vs. Walsh, 123 Maine, 157.

15. "The Abolition of Estates Tail", 21 Virginia Law Review, 286; Warren, "Gifts Over On Death Without Issue", supra, 342; "Definite and Indefinite Failure of Issue", 6 Columbia Law Review, 175, 182.

intention of the testator if it can be otherwise discovered, lay the foundation for construction. Without decision that this phrase imports an "indefinite failure of issue" in this jurisdiction, attention will be directed to the second point and an effort made to solve the problem of date of distribution with reference to the death of Henderson Brooke Deady.

There are many jurisdictions of the United States where the seventh clause of the will would be construed to mean that the fee title vested in Henderson Brooke Deady would pass on his death, whenever that occurred, to the grandsons, if no other intention were expressed as to this by the will.¹⁶ In Oregon, no canon of construction is closely followed and there is no clear expression that such rule ever would be applied. An attempt would be made to discover the intent from the context. The Oregon decisions can not be reconciled on any other basis. In *Rowland vs. Warren*, *supra*, the court held a purchaser from a devisee who died leaving children, under a will which provided for an executory devise over, if she died without children, took a fee simple title. In *Bilyeu vs. Crouch*, *supra*, there was a life estate to A, remainder to B and the heirs male of his body, in default of male children to the daughters of the testator, and in default of issue to the sisters of B. The court disregards the fact that what is dealt with is a remainder after a life estate,

16. *Britton vs. Thornton*, 112 U. S. 526, 533; *Boshell vs. Boshell*, 218 Alabama, 320; *Briggs vs. Hopkins*, 103 Ohio State, 321.

and holds the [41] intention of the testator was to give the fee to the sisters in case of death of B without children. Although the present question is discussed it is clear the facts were not such as called for application of any principles involved here,¹⁷ since there was a precedent life estate, and the court determines from the complicated language of the limitation that B was to take the fee if and only if he had heirs of his body.

Imbrie vs. Hartrampf, *supra*, is very similar in its facts and the provisions of the will to the case at bar. There a gift of a fee to Ralph was followed by a restriction on alienation until the devisee arrived at forty years of age, coupled with an executory devise on breach of condition. There were devises of fee title to other lands to others and a residuary devise. In a separate paragraph there is a provision that if any devisee "die without leaving lineal descendants, children or grandchildren" then his share should be equally divided. The testator died in 1897. In 1920, after Ralph had attained the age of forty without violating the restriction against alienation, the court held he could convey fee simple title.

The devise is "in full of any indebtedness" from testator to Ralph. This is probably evidentiary of

17. *Buchanan vs. Schulderman*. 11 Oregon. 150 and *Love vs. Walker*, *supra*, each dealt with a remainder over after a life estate, and in each instance the court attempted to discover actual intention of the testator from the context.

an intention to convey the fee. But no distinction between the case there and that at bar can be drawn, because the intent to give the fee is as clearly indicated here. The court found against the "death at any time" rule upon a situation quite comparable to that at bar. In so doing, the court quoted from *Britton vs. Thornton*, *supra*, apparently [42] with the idea that since the condition against alienation had expired the excerpt was applicable and supported the "intermediate date" of expiration which had been fulfilled. The court had theretofore expressed a decided preference for the "substitutional rule" and had indicated that it should be applied to the situation. The meat of the decision is that such a situation indicates a testamentary intent to give a fee simple absolute and repudiates the "death at any time" doctrine as applied to such facts. The concurring opinion finds the intent to give absolute title but avoids the executory devise for a violation of the rule against perpetuities. Great weight is here laid on the fact that the possible intermediate date had been fulfilled.

The present will contains less context to indicate that death of *Henderson Brooke Deady* "at any time" was fixed in the mind of the testatrix as the date of investment of complete title than does *Imbrie vs. Hartrampf*, *supra*. If *Henderson Brooke Deady* had outlived the period of twenty-five years from the death of the testatrix and all the other "conditions, provisions and charges" had been fulfilled, then the case would fit exactly into the situa-

tion in the Imbrie case. The Oregon court then would have held that he took a fee and it would not be necessary to determine what the effective date should be, whether in accordance with the "substitutional" or "intermediate date" doctrine.

In this connection, as to the fees granted respectively to the son and grandsons, the restriction on alienation for a period of twenty-five years seems to imply a complete control in the respective devisees after that period, at least. So far at least, the cases are similar.

The fees given to the son on the one hand and the grandsons on the other should be regarded together in order [43] to fix the point of complete investment. Neither should be cut down by construction. Each fee is subject to the same "conditions, provisions and charges". Henderson Brooke Deady's death is mentioned only once in connection with the devolution of the fee and that instance is in the disputed clause seven, itself.

In the clauses relating to the income, it is set forth in item five that a certain distribution is to be made "during the lifetime of my son Henderson Brooke Deady", but this is contradicted by the later limitation of that particular distribution to ten years, and the provision that Henderson Brooke Deady could by will continue the same part of the income to his widow. This carried on the distribution for a period beyond the death of Henderson Brooke Deady and beyond the twenty-five years.

It is to be noted that it is claimed that the will of Henderson Brooke Deady, whereby he transferred his interest in the income to his widow for life, was a construction of the will by him. But the portion which he bequeathed under this power was only the income. Apparently, he acquiesced in the twenty-five year restriction on alienation and believed his widow would receive the income only if he bequeathed it to her. It is certain he accepted the restriction on alienation during his lifetime, but that acceptance would not validate the restriction as matter of law. It seems clear the testatrix intended to recognize the devolution of this portion of the income, whether by incorporation by reference before her death or as a strict exercise of power after her death. Whether valid or not is a different question. Unquestionably, she intended the income to be distributed for twenty-five years, wherever the fee reposed. [44]

The fee given to the grandsons was to be enjoyed by them upon terms which had no relation to the death of Henderson Brooke Deady. This is a convincing argument toward the conclusion that the fee given to Henderson Brooke Deady was upon the same terms. The full enjoyment of the fees respectively relate only to the "conditions, provisions and charges" and are expressly conditioned upon the twenty-five year period.

Mrs. Deady contemplated the death of her son during this period, because in the clause appointing

the trustees she made provision for the carrying on of the trust after his death, although he was appointed as a trustee. Again this clearly points to the twenty-five year period which is the outstanding feature of the will.

In arriving at the conclusion that the death of Henderson Brooke Deady "at any time" was not contemplated by the testatrix as the period of distribution of the property allocated to him, the proposition is foreshadowed that there may have been some other date after her own death when she desired the son to come into full enjoyment, or an executory devise to take effect.

Where a gift of a fee with an executory devise over upon death of the first taker without children is postponed by an estate for life¹⁸ or for years,¹⁹ or by any other provisions which prevents the gift from having full effect,²⁰ the full enjoyment of the fee or the taking effect of the executory [45] devise

18. *Flores vs. DeGarza*, 44 Southwestern (2d), 909, Tex. Comm. App. 1932; *Matter of Farmer's Loan & Trust Co.*, 189 New York, 202; *Scanlin vs. Peterson*, 105 Connecticut, 308; *Booth vs. Eberly*, 124 Maryland, 22.

19. *Ensminger vs. Grimes*, 201 Kentucky, 494.

20. *In re Vizelich's Estate*, 12 Pacific (2d), 992, rehearing 18 Pacific (2d), 773 (Cal. App.); *Howard vs. Howard's Trustee*, 212 Kentucky, 847; *Gertig vs. Wells*, 100 Maryland, 93; *Boynton vs. Boynton*, 266 Massachusetts, 454; *Patterson vs. Madden*, 54 New Jersey Equity, 714; *Van Tilburg vs. Martin*, 120 Ohio State, 26.

is dependent upon this date, according to the decisions of many jurisdictions.

This doctrine is a corollary of the principle widely accepted that an "intermediate date" between the death of the testator and the death of the fee donee without children at any time will be selected, unless the will indicates a contrary intention. This later proposition steers between Scylla and Charybdis. It does not prevent the person to whom the fee was given from enjoying it during his lifetime. On the other hand, it avoids the "substitutional" rule which is criticised because of the fact that this interpretation was historically adopted for the purpose of avoiding the "indefinite failure of issue" construction. All in all, the wishes of most testators are best interpreted by choosing an "intermediate date".²¹

21. In *Britton vs. Thornton*, supra, it is said:

"When indeed a devise is made to one person in fee, and 'in case of his death', to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator."

The Oregon Supreme Court has quoted this case but has not followed it, since the decisions have

Oregon has not squarely accepted either phase of this rule but it is probable that the tendency would be to follow the results, which would be obtained by the application of either.

In *Shadden vs. Hembree*, 17 Oregon, 14, the court found that the testator gave a fee to his son Henry L. Hembree subject to the control of the widow over the property until [46] her remarriage or her death, but if both the widow and the son died before the son became twenty-one years of age, then to a nephew Frank M. Shadden. The testator died in 1876. The nephew died in 1879. The widow died in 1880, without remarriage. The son died in 1884 before he arrived at the age of twenty-one. The writer of the opinion adopted by the court says: "If I am correct in the view that Lycurgus Hembree (the testator) intended that the property in question should go to Frank M. Shadden only in the event that Henry L. Hembree died during the life of his mother, and that Shadden should be living at the time of the occurrence, then the contingency upon which the limitation over was made to depend never happened; * * *". The court picks this intention out of the will. But the court held that the son took a fee on the mother's death. In other words, when his enjoyment of the property

been controlled by the intention of the testator. See *Bilyeu vs. Crouch*, *supra*; *Love vs. Walker*, *supra*; *Kaser vs. Kaser*, 68 Oregon, 153; *Rowland vs. Warren*, *supra*, *Imbrie vs. Hartrampf*, *supra*.

was complete, he took the fee, and the executory devise failed even though he did not live to be twenty-one. Although the court goes roundabout to arrive at this conclusion, there is little doubt that the correct date of distribution was chosen. This case furnishes a clear precedent against the existence of the "death at any time" rule in this state, where the testator has not expressly set out such an intention.

The dissenting opinion in *Love vs. Walker*, *supra*, construes the will as creating a trust which was to be fulfilled within ten years after the testator's death, and as creating a fee simple determinable at that date "without lawful issue born alive and living at the time of his death". But the majority as above noted held that the codicil reduced the estate to one for life, so that this doctrine was not adopted by the court.

In the will under construction, however, a fee to Henderson Brooke Deady is given subject to certain "conditions, provisions and charges". Unless, therefore, a clearly valid "intermediate date", consistent with these limitations can be [47] found, no devise over should be given effect, but the primary grant should be absolute. The fees were given to the son and the grandsons, respectively, upon express condition against alienation for twenty-five years. If the title so passed to the sons and the grandsons, respectively, at the death of Lucy Deady, then this fetter could be stricken off by the

holder of the title.²² A restriction on alienation has nothing necessarily to do with the rule against perpetuities. However, the courts apply the same limitations to such a provision if extended over what is considered an unreasonable period of time.²³ While, therefore, the mere restriction upon alienation would not affect the title, a period for taking effect of an executory devise would be limited under the rule against perpetuities.²²

The Supreme Court of Oregon has held that where a restriction on alienation is imposed upon a fee title, during the entire life of the first taker, an executory devise dependent upon breach of this condition subsequent is void.²⁴ In the will here under consideration the restriction was for a period of twenty-five years by express condition subsequent. The devise over does not take effect upon breach of the restriction, but upon death without issue. However, the express condition against alienation and the limitation over on death without issue are mutually interdependent. The [48] context makes it improbable that Lucy A. H. Deady intended to deprive Henderson Brooke Deady of the

22. *Closset vs. Burtchaell*, 112 Oregon, 585.

23. *Gray, Perpetuities*, Sec. 118a; *Pulitzer vs. Livingston*, 89 Maine, 359, 363; *Colonial Trust Co. vs. Brown*, 105 Connecticut, 261, 279.

24. *Friswold vs. United States National Bank of LaGrande*, *supra*. The position is foreshadowed by the dissenting opinion in *Imbrie vs. Hartrampf*, *supra*.

full enjoyment of the fee during his life, although she desired to keep control for a long period. If he had outlived the *twenty-five period* of restriction and come into full enjoyment, he would have taken the fee title, as above noted. If he died prior to that date, the restriction against alienation would have fettered him during his entire life, and in any event might have denied him freedom of action for a period beyond which a restriction on alienation would be upheld. Since Henderson Brooke Deady took a fee upon the death of the testatrix, restricted by the express condition against alienation, which is void, an executory devise dependent either upon his death without issue during the time when this condition fettered enjoyment or after the expiration of the unreasonable period of twenty-five years would be void.

If, then, a strict application of the rule against perpetuities were made or the rule against unreasonable restriction on alienation affecting the devolution of title, the executory devise of this will is of no validity. The rule against perpetuities deals only with the vesting of estates and not with the enjoyment thereof. But an executory devise which may possibly not vest for a period over twenty-one years is void. This executory devise does not depend on lives in being but upon an arbitrary twenty-five year period. The time so limited, plus the express condition subsequent as to alienation for the period, prevent the devises over to the grandsons from taking effect.

The Court, however, does not necessarily hold that the [49] executory devise to the nephew are invalid upon these principles. The search was prosecuted for a valid "intermediate date" after the death of the testatrix without going to the extreme of holding the death of Henderson Brooke Deady "at any time" satisfied the intention.

As noted above, the most probable date of full enjoyment of the fees given respectively to the sons and grandsons was the end of the twenty-five year period during which Mrs. Deady did not desire this Lot One sold or mortgaged. The full enjoyment was circumscribed by "express condition" to that effect as to each parcel thereof.

No other "intermediate date" is possible. The death of Henderson Brooke Deady is not contemplated as the date of taking effect of the executory devise as has already been shown. Even if the lives of all those who had legacies charged against this parcel outlasted the twenty-five years, they might each have died and so the rule would still take effect. But a reading of the document convinces the court that the twenty-five year date was controlling of all other factors. The period of ten years is unquestionably so controlled and simply provides for a different distribution of the income.

The question of whether there was a valid trust arises here, but does not affect the solution.²⁵ If title in fee was given to the trustees, the trust did not

25. Closset vs. Burtchaell, *supra*.

end with the death of Henderson Brooke Deady, because there is a provision for continuance by the Bank afterward. The same difficulties as to the period of distribution by the trustees arise. Here the twenty-five year period still is controlling. An executory [50] devise dependent upon the fee given to trustees for twenty-five years would be invalid. If these trustees took an estate for years, the result would be the same, because an executory devise could not take effect thereafter.²⁶ The court construes the will, however, as providing trustees to manage the estate, build up a trust fund and to pay out the income in accordance with the directions thereof for a period of at least twenty-five years.

If this conclusion is correct, the limitation upon the income had no effect upon the devolution of the title. The clause of restraint on alienation considered as such is not effective as against the son and grandsons, as holders of the fees of the different parcels. But there is, then, no criterion as to an "intermediate date" for taking effect of the executory devise, except the time when the respective devisees would have come into full enjoyment under the express condition.

The twenty-five year period, then, is the salient factor of the will. The court thus arrives at the conclusion that no valid "intermediate date" can be chosen which will give validity to the executory

26. See *In re Johnston*, 185 Pennsylvania, 139.

devise. The fee was given. A like fee was given the grandsons. The "conditions, provisions and charges" do not affect the passing of title. The fee should not be cut down, except by a clear expression. There is no clear expression as to an intermediate time for the taking effect of the executory devise. Whether this time be chosen as the time when distribution of the particular property was to be made, or the time when the trustees were to go out of control or when the son and grandsons were to [51] receive the full enjoyment of the respective fees, the result is the same, the executory devise would be invalid. If this, then, were the expressed intention of the testatrix, effect could not be given to it, since the intent offends a rule of public policy.²⁷

The rule, formerly supported by the heavy weight of authority and still by respectable modern decisions²⁸ in the United States, affords a method of carrying out the main intention of the testatrix. Such decisions rule that where a fee is given to be determined upon "death without issue", that in the absence of an expression of a contrary intention in the will, if the original donee outlive the testator he takes in fee simple absolute; if he "die without issue" during the lifetime of the testator, the gift over takes effect by way of substitution, but not by executory devise.

27. *Closset vs. Burtchaell*, *supra*, 601.

28. *In re Gulstine's Estate*, 166 *Washington*, 325; *Will of Caldwell*, 205 *Wisconsin*, 587; *Hull vs. Hull*, 101 *Connecticut*, 481.

The existence of this doctrine in Oregon has been denied by implication²⁹ and by implication affirmed³⁰ by the Supreme Court of the State. But the intention in this particular will to give the fee is clear. Henderson Brooke Deady was obviously the favorite son. Another portion of the property is given him in fee simple. He is named as the principal legatee. He is one of the residuary legatees. He is chief devisee of the income. He is a trustee under the will. The creation of the trust to pay off the mortgage was an attempt to assure Henderson Brooke Deady of an estate clear of indebtedness at the end of a period of time which [52] the law holds unreasonable. But it gives no indication that he was not to have fee title.

The Oregon court have not construed the words "die without issue" to import "indefinite failure of issues", and the probabilities are will never do so. Since the state was not created until 1859 and the older constructions were then passing away, it would seem anomalous in a jurisdiction where entailed estate have never been recognized to do so. But the judges of the common law so held,³¹ and earlier there might have been a tendency to follow the majority of American precedent. The tendency

29. *Bilyeu vs. Crouch*, *supra*; *Rowland vs. Warren*, *supra*.

30. *Imbrie vs. Hartrampf*, *supra*.

31. *Oregon Laws*, 1843, page 100; *Oregon Constitution*, Article XVIII, Sec. 7; *Rowland vs. Warren*, *supra*, 129; *Barber vs. Pittsburg, Fort Wayne & Chicago Railway Company*, *supra*, 83.

of the court at present, would be to examine the context of the will and seek a guide to the meaning of the testatrix. If the search for a definite expression failed or the express desire might be against public policy, the court would avoid the consequences of a holding that these words imported "indefinite failure of issue" by use of the "substitutional rule" where, as here, the intent to give a fee to the first taker is clearly expressed. The cardinal factor of the intention of the testatrix would thus be carried out. The preference for early vesting of estates delineated by the decisions of the Oregon court would have its effect. The rule against cutting down a fee given in an early clause of a will has compelling influence and would be thus carried out. If the court looked at the clause as an attempt to create a fee tail in Henderson Brooke Deady the construction would be the same.³² [53]

Argument is made that the words "subject to" in the third clause prevent this construction, but the court has already noted that the seventh item was not thereby referred to. It is also said that the word "vest" in the seventh item refers to a time after the death of the testatrix, but inasmuch as this word is used in connection with the phrase "I give and devise", it seems more reasonable, all other things being equal, to refer them to the date of the death of Mrs. Deady.³³

32. Fee tail abolished in Oregon, Sec. 63-105, Oregon Code 1930.

33. See *Fowler vs. Duhme*, 143 Indiana, 248.

The will of the testatrix can be carried out by the application of this doctrine. She intended Henderson Brooke Deady to have a fee. She intended this fee to be subject to the "conditions, provisions and charges" set out. If this construction is carried out the fee will still be subject to these, so far as valid. She intended to control her property far into the future. Therefore, a sale either during a period of twenty-five years by her sons or her grandsons would be contrary to her intention. But this desire to hold the property intact cannot be carried out fully. The construction carries out the will of the testatrix as far as possible.

The suit is brought in time, as the point of attack is not the construction of the will or the recovery of the property, but an accounting for the income to which plaintiff claims to have been entitled since the death of his mother.

The motion to dismiss is overruled.

[Endorsed]: Filed December 1, 1939. G. H. Marsh, Clerk, By F. L. Buck, Chief Deputy. [54]

And afterwards, to wit, on the 31st day of January, 1940, there was duly filed in said Court, an Answer to Amended Complaint in words and figures as follows, to wit: [55]

[Title of District Court and Cause.]

ANSWER

The defendants answer the amended complaint herein as follows:

First Defense

The amended complaint fails to state a claim against the defendants, or any of them, upon which relief can be granted, in that it fails to show that the plaintiff has any interest in the property in question.

Second Defense

The amended complaint contests the validity of the will of Lucy A. H. Deady, and said will was admitted to probate more than one year prior to the commencement of this suit.

Third Defense

Any right of action set forth in the amended complaint did not accrue within the ten years next preceding the commencement of this suit.

Fourth Defense

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I of the amended complaint.

II.

Admit the allegations contained in Paragraphs II, III, and IV. [56]

III.

Answering Paragraph V, admit that on August 29, 1923, Lucy A. H. Deady was seized in fee of the real property described in said paragraph; that she died on said date leaving the last will and testament of which a substantial copy is set out in said paragraph; that said will was duly and regularly proved and admitted to probate in the Circuit Court of the State of Oregon for Multnomah County on the 5th day of September, 1923, and Letters Testamentary were issued on the 15th day of September, 1923, to Joseph Simon and Henderson Brooke Deady as executors thereof, and administration of the estate was had thereunder; that said estate was closed on the 6th day of March, 1936, and The First National Bank of Portland, then the Executor thereof, was discharged; that the real property described in said paragraph constituted the major portion of said Lucy A. H. Deady's estate, and at the time of her death was profitably leased for a long period of years and was yielding substantial revenue; and that said lease is, in a modified form, still in existence and has a number of years to run. Except as herein admitted, defendants deny the allegations contained in said paragraph.

IV.

Admit the allegations contained in Paragraph VI, except as to the date of the Letters Testamentary, which date is 1933 instead of 1923.

V.

Answering Paragraph VII, admit that Charlotte Howell Deady died on or about the 12th day of July, 1935. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

VI.

Answering Paragraph VIII, admit that there is a controversy between the plaintiff and the defendants herein involving, in part, the construction and legal interpretation of the will of Lucy A. H. Deady; that the plaintiff makes, among others, the claims and contentions set out in Subparagraphs (a), (b), (c), and (d); that the defendants contend that under the will of Lucy A. H. Deady there was devised to Henderson Brooke Deady a defeasible fee estate in Lot 1, [57] Block 212, City of Portland, Oregon, subject to be defeated upon his death without issue, and a power of appointment to be exercised by him in favor of his wife as provided in the Eighth Item of said will, and that upon the death of Henderson Brooke Deady without issue his said estate in said Lot 1, Block 212, was defeated and his widow, Charlotte Howell Deady, received only the interest created by his exercise of the power of

appointment, and did not receive an estate of inheritance in said property. Except as herein admitted, defendants deny the allegations contained in said paragraph.

VII.

Answering Paragraph IX, admit that Joseph Simon, surviving executor and trustee of the estate of Lucy A. H. Deady, died on the 14th day of February, 1935 (erroneously stated in the amended complaint to be 1934), and the defendant First National Bank was, on the 27th day of February, 1935 (erroneously stated in the amended complaint to be 1934), appointed and qualified as executor thereof, and continued as such until the 6th day of March, 1936, when the estate of Lucy A. H. Deady was closed and said bank discharged as executor; that said bank ever since has managed and controlled said Lot 1, Block 212, and collected, received, and disbursed the income therefrom as trustee of said estate; that the plaintiff does not know the amount of money received by said bank from said property since the 6th day of March, 1936, and the disposition thereof; that a portion of said income has been, and is being, paid to the defendants Matthew Edward Deady and Hanover Deady by said bank; that plaintiff has made a demand upon each of the defendants for an accounting of the income and profits and for payment to him of a share thereof; that the defendants have not rendered such an accounting or paid over to the plaintiff any part

of the income, and now refuse to do so, and deny that plaintiff has any right therein; and that the defendant bank intends to continue to manage and control said property and receive and disburse the rents and profits therefrom without paying any part thereof to the plaintiff. Except as herein admitted, defendants deny the allegations contained in said paragraph.

VIII.

Answering Paragraph X, deny that plaintiff is entitled to any remedy at law [58] or in equity.

Fifth Defense

The Estate of Henderson Brooke Deady, through whom the plaintiff claims, has not been closed, and no order has been entered therein taking the right to possession of, or to the rents and profits from, Lot 1, Block 212, City of Portland, Oregon, from the Executor of the Estate of Henderson Brooke Deady.

Sixth Defense

The Estate of Charlotte Howell Deady, through whom plaintiff claims, has not been closed and no order has been entered therein taking the right to possession of, or to the rents and profits from, Lot 1, Block 212, City of Portland, Oregon, from the Executor of the Estate of Charlotte Howell Deady.

Seventh Defense

Lucy A. H. Deady, by the language used in her will, intended to give Henderson Brooke Deady only a defeasible fee in Lot 1, Block 212, City of Port-

land, Oregon, subject to be defeated in favor of Hanover Deady and Matthew Edward Deady by Henderson Brooke Deady's death under the circumstances under which it occurred.

Eighth Defense

Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady, Joseph Simon (mentioned in the will of Lucy A. H. Deady), and the defendant The First National Bank, and Charlotte Howell Deady (mentioned in the will of Henderson Brooke Deady), and Robert H. Strong, the Executor of the Estate of Henderson Brooke Deady, at all times construed the will of Lucy A. H. Deady to mean, and said Lucy A. H. Deady to intend by said will, that Henderson Brooke Deady, upon the death of the testatrix, received only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated by his death without leaving issue.

Ninth Defense

Henderson Brooke Deady, from the death of Lucy A. H. Deady to the time of his own death, represented to the defendants Hanover Deady and Matthew Edward Deady that Lucy A. H. Deady, by her will, intended to and did give him (Henderson Brooke Deady) only a defeasible fee in Lot 1, Block 212, City of Portland, [59] Oregon, which would be defeated in favor of Hanover and Matthew upon Henderson's death without leaving issue, and that under the will of said Lucy A. H. Deady he received

such an estate in said property, and that upon his death without leaving issue his interest in the property would go to them, subject to the power of appointment in favor of his wife given him in said will; and Henderson Brooke Deady intended them to act upon said representations, and they did act thereon to his benefit and their detriment. Henderson Brooke Deady at all times acquiesced in that interpretation of the will, elected to accept that interest, and waived any other interest. And the Executor of the Estate of Henderson Brooke Deady accepted and acquiesced in that interpretation of the will of Lucy A. H. Deady. And Charlotte Howell Deady accepted, acquiesced in, and elected to take under that interpretation of Lucy A. H. Deady's will. And the plaintiff is estopped to claim that Henderson Brooke Deady had any other or different estate or interest in the property.

Tenth Defense

From the death of Lucy A. H. Deady in August, 1923, up to the bringing of this suit in July, 1936, the plaintiff and the persons through whom he claims knew that the executors of the estate of Lucy A. H. Deady and the defendants herein considered and were acting upon the basis that Henderson Brooke Deady received under the will of Lucy A. H. Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, together with the power of appointment given him in said will; and until shortly before the bringing of this suit no claim was made by

the plaintiff, or any person through whom he claims, that Henderson Brooke Deady received under said will any other estate in said Lot 1, Block 212. And no such claim was made until after the death of the attorney who prepared the will, the witnesses thereto, the executors named in said will, and other persons having information and knowledge concerning, and who would be able to give testimony to meet, the issues raised by the the amended complaint, and until after the loss or destruction of documentary and other evidence bearing on said issues. The testimony of said witnesses and said other evidence are irreplaceable. The right of action set forth in the amended complaint is barred by laches, and to allow the plaintiff, under the circumstances, to assert, [60] at this late date the claim he makes against these defendants, or any of them, is contrary to equity and good conscience.

Wherefore, defendants pray that the plaintiff's amended complaint be dismissed, and that judgment and decree be entered for the defendants and for their costs and disbursements herein.

SIMON, GEARIN, HUMPHREYS & FREED
EDGAR FREED

Attorneys for the Defendants

1111 Failing Building

Portland, Oregon

[Endorsed]: Filed January 31, 1949. G. H. Marsh,
Clerk, by F. L. Buck, Chief Deputy. [61]

And afterwards, to wit, on Monday, the 23rd day of December, 1940, the same being the 42nd Judicial day of the Regular November, 1940, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [62]

[Title of District Court and Cause.]

PRETRIAL ORDER

This suit coming on regularly for pre-trial, the plaintiff appeared by Robert F. Maguire and Donald K. Grant, his attorneys, and defendants appeared by Edgar Freed and Nicholas Jaureguy, their attorneys. And the application of the new Rules of Federal Procedure for District Courts of the United States having been deferred by order of this court until after its ruling upon defendants' motion to dismiss, it was stipulated by said parties that this pre-trial and the embodiment of the facts and issues of this case in the pre-trial order should not prejudice any rights the defendants might now have by reason of the overruling of their said motion to dismiss.

Thereupon, the parties further stipulated that the following are

AGREED FACTS

I.

That plaintiff is a citizen and resident of the State of Connecticut and is one and the same per-

son as Richard Howell Busck, a son of Charlotte Howell Deady, who is named in the last will and testament of the said Charlotte Howell Deady as her sole legatee and devisee, all of which more fully appears from the last will and testament of the said Charlotte Howell Deady, a copy of which is plaintiff's pre-trial exhibit number 2. [63]

II.

That the defendants, Matthew Edward Deady and Hanover Deady are citizens and residents of the State of Oregon.

III.

That the defendant, The First National Bank of Portland, is a national banking association organized and existing under the national banking laws of the United States of America with its office and principal place of business in the City of Portland, State of Oregon.

IV.

That the controversy herein involves money and property rights exclusive of interest and costs of a value in excess of \$3,000.00.

V.

That on and before the 29th day of August, 1923, the said Lucy A. H. Deady was seized in fee of the following described real property located and situated in the City of Portland, County of Multnomah, State of Oregon, to-wit:

Lot One (1), Block Two Hundred and Twelve (212), City of Portland, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That on or about said date the said Lucy A. H. Deady died leaving a last will and testament; that said will was duly and regularly proved, admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, on the 5th day of September, 1923; that letters testamentary issued out of said court on the 15th day of September, 1923, to Joseph Simon and Henderson Brooke Deady as executors of the last will and testament of the said Lucy A. H. Deady, deceased, and administration of the estate of the said Lucy A. H. Deady was had thereunder; that said estate was closed and the First National Bank, then the executor, was discharged on the 6th day of March, 1936; that said last will and testament of the said Lucy A. H. Deady in words and figures is substantially as follows, to-wit: [64]

In the Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the later

Matthew P. Deady, make this the following my

Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property shall be distributed as follows:

(a) To the payment of each of my grandsons,—Matthew Edward Deady and Hanover

Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1, Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said

property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block [65] numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife (if he then has a wife), the income that would have been derived by him if living, from the two-thirds of Lot 1, Block 212, (City of Portland. Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds

to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures which my grandsons Matthew, Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my Last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees named herein, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former wills by me at any time made.

In Witness Whereof, I have hereunto set my hand and seal this the 29th day of July, A. D. 1920, at Portland, Oregon.

(Signed) LUCY A. H. DEADY (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other have subscribed our names as witnesses thereto.

(Signed) CHESTER V. DOLPH, Residing at Portland, Or.

(Signed) J. V. BEACH, Residing at Portland, Or. [66]

That the real property first described in this paragraph constituted the major portion of said Lucy A. H. Deady's estate, and at the time of her death was profitably leased for a long period of years and was yielding substantial revenue; and that said lease is, in a modified form, still in existence and has a number of years to run.

VI.

That after the death of Lucy A. H. Deady, no conveyance of any title to said property was made by Henderson Brooke Deady during his lifetime and that the said Henderson Brooke Deady died having had no issue and leaving no issue him surviving, on or about the 28th day of May, 1933, leaving a last will and testament wherein and whereby he devised and bequeathed all of his property, real and personal, to his wife, Charlotte Howell Deady; that a copy of the last will and testament of said Henderson Brooke Deady is plaintiff's pre-trial Exhibit 1; that the said last will and testament was, on the 18th day of July, 1933, duly and regularly proved and admitted to probate in the Circuit Court of Multnomah County, State of Oregon, Department of Probate, and administration of said estate commenced thereunder by letters dated July 18, 1933, appointing Robert H. Strong as executor thereof, who thereafter and on the 18th day of July, 1933, duly qualified and became such executor; that on July 18, 1933, Robert H. Strong named in said will as executor, filed his petition for

the probate thereof, and a copy of said petition is defendants' pre-trial Exhibit A; and on June 14, 1935, said Robert H. Strong, as such executor, filed the inventory and appraisement of said estate, and a copy of said inventory and appraisement is defendants' pre-trial Exhibit B.

VII.

That the said Charlotte Howell Deady died on or about the 12th day of July, 1935, leaving a last will and testament wherein [67] and whereby she devised and bequeathed all of her property, real, personal and mixed, to the plaintiff, her son, otherwise known and named in said will as Richard Howell Busek; that a copy of said last will and testament of the said Charlotte Howell Deady is plaintiff's pre-trial Exhibit 2; that on the 22nd day of July, 1935, said last will and testament of the said Charlotte Howell Deady was duly and regularly proved and admitted to probate in the State of Connecticut and that on said date the plaintiff herein was appointed and qualified as executor of the said last will and testament of the said Charlotte Howell Deady.

That all steps up to and including the filing of the final account have been taken in the administration of said estate; that the creditors of said Charlotte Howell Deady have been paid and that upon the termination of this suit and the determination of any estate tax or inheritance tax which may be due by reason of any interest in said Lot 1,

Block 212, Portland, which may be determined to have passed to plaintiff, said estate will be ready for publication of final notice and closing. That no report has yet been made by the executor of said estate relative to Federal Inheritance Taxes.

VIII.

That there exists between the plaintiff and defendants herein an actual bona fide and justifiable controversy within the meaning of the provisions of Title 28 U. S. C. A., Sec. 400, which said controversy involves in part the construction and legal interpretation of the said last will and testament of the said Lucy A. H. Deady and depends for its determination upon a judicial declaration of the legal rights of this plaintiff thereunder; but in admitting the existence of this controversy, the defendants do not waive any of their defenses involved in the issues of law hereinafter set forth, and do not admit that the plaintiff is a proper party to bring this suit, or that necessary parties are not lacking; that the said controversy is substantially as follows:

(a) That the plaintiff, as successor in interest, [68] by successive testamentary devises of Henderson Brooke Deady as hereinbefore alleged, claims and asserts that he is the owner in fee simple of an undivided two-thirds of said Lot 1, Block 212, Portland, Oregon, and is entitled to two-thirds of the rents, profits and income therefrom, subject only to a charge thereon for payment of the lega-

cies and annuities in said will contained from and after the 12th day of July, 1935, being the date of the death of Charlotte Howell Deady from whom the plaintiff has inherited.

It is the specific contention of plaintiff that paragraph 3 of the said last will and testament of Lucy A. H. Deady constitutes a testamentary disposition in fee simple absolute and that the "conditions, provisions and charges" to which said devise is made subject, relate only to the lawful conditions, charges and provisions contained in paragraphs fifth, sixth and ninth of said will to which the testamentary gift to defendants Matthew Edward Deady and Hanover Deady are likewise subject; that paragraph seventh of said will is not to be construed as any condition to or limitation on or reduction or possible defeasance of the fee estate devised to Henderson Brooke Deady in paragraph 3; that the said paragraph seventh related to and was applicable only on the contingency of the death of Henderson Brooke Deady prior to that of Lucy A. H. Deady; that this contingency did not occur and Henderson Brooke Deady became seized on the death of Lucy A. H. Deady of an estate of inheritance which he devised on his death to his widow, Charlotte Howell Deady, and which she, the said Charlotte Howell Deady, devised to this plaintiff, the said rightful owner thereof; that if paragraph seventh of the last will and testament of Lucy A. H. Deady did not refer to the contingency of the death of Hen-

derson Brooke Deady prior to the death of the testatrix, it only provided for an executory devise to the two grandsons of Lucy A. H. Deady in case Henderson Brooke Deady died without issue; that the provisions of paragraph seventh of said last will and testament and if it be an executory devise contained therein, are invalid and [69] void under the rule as to perpetuities.

That the defendants contend that under the will of Lucy A. H. Deady there was devised to Henderson Brooke Deady a defeasible fee estate in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated upon his death without issue, and a power of appointment to be exercised by him in favor of his wife as provided in the Eighth Item of said will, and that upon the death of Henderson Brooke Deady without issue, even though subsequent to the death of the testatrix, his said estate in said Lot 1, Block 212, was defeated and his widow, Charlotte Howell Deady, received only the interest created by his exercise of the power of appointment, and did not receive an estate of inheritance in said property.

(b) That the plaintiff further contends that the said defendant, The First National Bank of Portland, is without authority to manage said property and collect and disburse the profits and income therefrom since its discharge as executor of the estate of Lucy A. H. Deady; that said right as exercised by the defendant, The First National Bank of Portland, is an incident of ownership and there-

fore accrues to the devisees or their successors upon the distribution of the property to them and the discharge of the executor; that the said last will and testament of the said Lucy A. H. Deady does not create a valid or any trust since there is no trust res conveyed to, settled upon, or vested in any person or persons for the benefit of another, and that the use of the word "trustee" in the last paragraph of said will in the absence of any language creating a trust is not sufficient to vest any persons or corporation therein named as "trustees" with any property, interest, title or right sufficient to constitute said persons as trustees or to clothe them with the power and authority of a trustee, that consequently the management of said real property by the defendant, The First National Bank, and the collection and disbursement of the income therefrom, is an invasion of the plaintiff's property rights and has resulted and will continue to result in [70] pecuniary damage to plaintiff in a substantial amount.

(c) That plaintiff further contends that paragraph sixth of said will is invalid, void and of no force and effect, insofar as it purports to impose a limitation on the power of the devisees in said will named and their successors to partition, encumber or alienate the real property therein named and involved herein for an absolute period of twenty-five years after the death of the testatrix; that such attempted and purported limitation vio-

lates the rule against perpetuities and therefore must fail.

(d) That the plaintiff further contends that paragraph fifth of said will is invalid and void and without force or effect, under the rule as to perpetuities, for the reason that the provision contained therein "That from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom the inheritance tax properly chargeable against my estate, ^{or} the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1,000 or more than \$2,500 per year, in discretion of my executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1, Block numbered 212", provides for the accumulation from the income from said property, for more than lives in being, at the time of the death of the testator, plus twenty-one years. That said provision being invalid, void and of no effect, the provision for the payment of any legacies whatsoever, from the income from said estate, is also invalid and void.

IX.

That Joseph Simon, executor of the estate of Henderson Brooke Deady, died on the 14th day of February, 1935, and the defendant, The First National Bank of Portland, was, on the 27th day of February, 1935, appointed and qualified as executor of the

estate of said Lucy A. H. Deady, deceased, and continued as such until the 6th day of March, 1936, when the estate of said Lucy A. H. Deady was closed and the [71] defendant, The First National Bank of Portland, was discharged as executor.

X.

That said bank every since the 27th day of February, 1935, has managed and controlled said Lot 1, Block 212, and collected, received and disbursed the income therefrom, purporting to act as trustee* of said estate; and that the plaintiff does not know the amount of money received by said bank from said property since the 6th day of March, 1936, and the disposition thereof; that a portion of said income has been, and is being, paid to the defendants, Matthew Edward Deady and Hanover Deady by said bank; that plaintiff has made a demand upon each of the defendants for an accounting of the income and profits and for payment to him of a share thereof; that the defendants have not rendered such an accounting or paid over to the plaintiff any part of the income, and now refuse to do so, and deny that plaintiff has any right therein; and that the defendant bank intends to continue to manage and control said property and receive and disburse the rents and profits therefrom without paying any part thereof to the plaintiff.

*In using the words "purporting to act as trustee" here, the parties are not agreeing either that the bank was or that it was not qualified so to act,—that being one of the issues in this case.

Agreed Facts Concerning Defenses**

XI.

This suit was begun on or about July 11, 1936.

XII.

At the time of the death of Lucy A. H. Deady, Henderson Brooke Deady was married to Amalie B. Deady. At that time they were separated and thereafter divorce proceedings were commenced. Henderson Brooke Deady and Amalie B. Deady thereafter arrived at a property settlement and a decree of divorce was granted in the Circuit Court of the State of Oregon for Multnomah County to Amalie B. Deady against said Henderson Brooke Deady. A copy of the complaint in said divorce proceedings, [72] with the property settlement which was entered into by the parties and approved by the Court, attached thereto, is defendants' pre-trial Exhibit C.

XIII.

Subsequent to the death of Lucy A. H. Deady and on or about the 3rd day of September, 1924, a suit in equity was filed in the Circuit Court of the State of Oregon for Multnomah County by Marye Thompson Deady, one of the beneficiaries mentioned in

**In agreeing to the existence of any facts hereinafter set out, the plaintiff does not waive his right to object to their competency, relevancy or materiality nor waive his right to require the court to rule on each of the Issues of Law hereinafter set out.

paragraph Fifth of the Last Will and Testament of Lucy A. H. Deady, deceased, and widow of Paul R. Deady, one of the sons of Lucy A. H. Deady, in which said suit Matthew Edward Deady, Hanover Deady, Henderson Brooke Deady, and all other beneficiaries under said will, and the executors thereof, were defendant. Said suit sought a decree to the effect that said Lucy A. H. Deady had held the legal title to one-third of said Lot 1, Block 212, City of Portland, Oregon, in trust for said Paul R. Deady and his heirs, subject to a life estate in favor of Lucy A. H. Deady, and sought to impose a trust upon said one-third interest of said real property in favor of said Marye Thompson Deady. All of said defendants joined in the defense of said suit throughout, filing a general demurrer to the original complaint, which demurrer was sustained; thereafter said plaintiff filed her amended complaint in said cause, a copy of which is defendants' pretrial Exhibit D.

Said suit was eventually compromised by an agreement of the parties to the effect that the monthly payments to be paid to said Marye Thompson Deady from the income of said real property be increased from the sum of \$75 per month as provided in said will to the sum of \$150 per month, and that such payments should continue during the natural life of said Marye Thompson Deady. A copy of the agreement of compromise is defendants' pretrial Exhibit E.

XIV.

Between the date of the death of Lucy A. H. Deady, August 29, 1923, and the date of the death of Charlotte Howell Deady, July 12, 1935, there were paid, from the income of Lot 1, Block 212, City of [73] Portland, Oregon, the following sums to the following persons, respectively:

Mary E. Deady (The widow of Edward Nesmith Deady)

From Dec. 1923 to May 10, 1935 (date of death).....\$150 per month

Marye T. Deady (Widow of Paul R. Deady)

From Sept. 1923 to Oct. 1925.....\$ 75 “ “

Subsequent to Nov., 1925.....\$150 “ “

Henderson B. Deady (not including Executor's fees)

From Dec. 18, 1923 to Jan. 1, 1925 (inc.).....\$300 “ “

From Feb. 3, 1925 to Nov. 3, 1925 (inc.).....\$400 “ “

From Dec. 2, 1925 to Feb. 1, 1927 (inc.).....\$475 “ “

From Mar. 1, 1927 to May 1, 1928 (inc.).....\$500 “ “

From June 1, 1928 to Dec. 30, 1930 (inc.).....\$750 “ “

From Feb. 1, 1931 to June 22, 1931 (inc.).....\$400 “ “

From July 1, 1931 to May 28, 1933 (inc.)
(date of death) \$600 “ “

Plus: 4/25/33—from surplus.....\$300

Robert Strong (As executor of the estate of Henderson

Brooke Deady which were paid by said executor to and
for the benefit of Charlotte H. Deady)

From June, 1933 to July 12, 1935 (date of death of
Charlotte Howell Deady).....\$600 “ “

Hanover Deady

From Dec. 18, 1923 to June 22, 1931 (inc.).....\$100 “ “

From July 31, 1931 to July 12, 1935.....\$150 “ “

Plus: 4/25/33—from surplus.....\$150

Matthew E. Deady

From Dec. 18, 1923 to June 22, 1931 (inc.).....\$100 “ “

From July 31, 1931 to July 12, 1935.....\$150 “ “

Plus: 4/25/33—from surplus.....\$150

XV.

At the date of each accounting rendered to the Probate Court by the Executors of the Estate of Lucy A. H. Deady, the amount of cash on hand in said estate was as follows:

Balance of cash on hand at date of 1st Accounting	Sep. 15, 1924	\$934
“ “ “ “ “ “ “ “ 2nd “	Sep. 1, 1925	3,192
“ “ “ “ “ “ “ “ 3rd “	Oct. 31, 1927	2,333
“ “ “ “ “ “ “ “ 4th “	Nov. 30, 1928	1,544
“ “ “ “ “ “ “ “ 5th “	Dec. 2, 1929	1,606
“ “ “ “ “ “ “ “ 6th “	Jan. 3, 1931	463
“ “ “ “ “ “ “ “ 7th “	Nov. 3, 1932	937
“ “ “ “ “ “ “ “ 8th “	Apr. 5, 1934	2,402
“ “ “ “ “ “ “ “ 9th “	Feb. 14, 1935	1,687
(On Joseph Simon's death)		
“ “ “ “ “ “ “ “ Final “	Dec. 2, 1935	428
(Bank)		

XVI.

At the date of the death of Lucy A. H. Deady, said Lot 1, Block 212 was encumbered by a first mortgage executed by her on December 12, 1917, in the sum of \$40,000.00, with interest at 6% in favor of The Northwestern Mutual Life Insurance Company, due and payable ten years from the date thereof. There remained unpaid on the principal of said mortgage at the date of Lucy A. H. Deady's death the sum of \$40,000.00. On January 13, 1928, said mortgage was extended for a period of five years to December 12, 1932, with the privilege of paying \$1,-

600.00 or more on the principal on December 12, 1929, and at interest periods thereafter, with interest at 5% payable semi-annually. Thereafter, on December 20, 1932, the mortgage was further extended for a period of five years to December 12, 1937, with the privilege of paying \$1,000.00 or more on December 12, 1934, and on interest dates thereafter, with interest at 5½% payable semi-annually. There were paid upon the principal of said mortgage by the Executors the following sums and none other:

Principal of Mortgage at Date of Death		\$40,000.00
Dec. 5, 1930.....	2,500.00	
June 2, 1931.....	2,000.00	
Dec. 4, 1931.....	1,500.00	
June 8, 1932.....	1,000.00	
June 5, 1933.....	1,000.00	
June 7, 1934.....	2,000.00	
July 6, 1935.....	1,000.00	11,000.00
		<hr/>
Balance due		\$29,000.00

XVII.

After the death of Henderson Brooke Deady, Charlotte Howell Deady, his widow, paid or caused to be paid to Amalie B. Deady, Henderson Brooke Deady's first wife, the sum of \$200.00 per month until the death of Charlotte Howell Deady out of the moneys said Charlotte Howell Deady received from the Executor of the Estate of [75] Henderson Brooke Deady, being a part of the moneys received by said Executor from the Executor of the estate

of Lucy A. H. Deady referred to in paragraph XIV hereof.

XVIII.

Subsequent to the death of Henderson Brooke Deady, the Executor of the Estate of Lucy A. H. Deady paid to the Treasurer of the State of Oregon, the sum of \$2,500.00 as inheritance tax arising and due from said Estate of Lucy A. H. Deady by reason of the exercise by Henderson Brooke Deady in his will in favor of Charlotte Howell Deady of the power of appointment set forth in Paragraph Eighth of the will of Lucy A. H. Deady.

XIX.

The assets of the Lucy A. H. Deady Estate, together with the appraised value thereof, at the time of her death, as shown by the inventory and appraisal on file in said estate were as follows:

Lot 1, Block 212, City of Portland.....	\$275,000.00
All other assets.....	1,347.02

The estate of Lucy A. H. Deady paid a federal estate tax in the sum of \$3223.57 and Oregon state estate and inheritance taxes in the amounts set out in the order to fix such taxes, a copy of which is defendants' pretrial Exhibit F, exclusive of the payment referred to in paragraph XVIII hereof.

XX.

At the time of the execution of her last will, Lucy A. H. Deady was 86 years of age, and at the date of

her death her age was 89 years. At the time of the execution of her will, and also at the time of her death, she had one living child, Henderson Brooke Deady, and two deceased children, Paul Deady and Edward Deady; three daughters-in-law, Amalie B. Deady (then the wife of Henderson Brooke Deady), Marye T. Deady (widow of Paul R. Deady), and Mary E. Deady (widow of Edward Deady); two grandchildren, Matthew Edward Deady and Hanover Deady, children of Edward Deady. At the time of the execution of Lucy A. H. Deady's last will, Henderson Brooke Deady was 51 years of age, [76] Matthew Edward Deady was 31 years of age, and Hanover Deady was 28 years of age. At the time of the execution of Lucy A. H. Deady's last will and testament, Henderson Brooke Deady was, and for a long time had been, living apart and separated from his wife, Amalie B. Deady.

XXI.

At all times since June 18, 1933, Robert H. Strong has been and now is the duly qualified and acting executor of the estate of Henderson Brooke Deady, deceased.

Exhibits

The following exhibits were offered by plaintiff at the pretrial and identified.

Plaintiff's Pretrial Exhibit No. 1—Last Will and Testament of Henderson Brooke Deady.

Plaintiff's Pretrial Exhibit No. 2—Last Will and Testament of Charlotte Howell Deady.

Plaintiff's Pretrial Exhibit No. 3—Carbon copy of letter dated March 14, 1936, from Maguire, Shields & Morrison to Matthew Edward Deady and Hanover Deady.

Plaintiff's Pretrial Exhibit No. 4—Letter dated June 7, 1935, from Wilbur, Beckett, Howell & Oppeheimer to Robert F. Maguire.

Plaintiff's Pretrial Exhibit No. 5—Carbon copy of letter dated June 7, 1935, from Maguire, Shields & Morrison to Ralph W. Wilbur.

[It is hereby stipulated that the pre-trial order may be and is hereby amended by adding on page 15, at the end of plaintiff's pre-trial exhibits, the following:

Plaintiff's Pretrial Exhibit No. 9—Letter of Ralph W. Wilbur, dated July 15, 1933;

Plaintiff's Pretrial Exhibit No. 10—Letter of Joseph Simon, dated July 17, 1933.

The defendants admit the authenticity of each of said letters, but reserve their objections to each of the same on the ground that each is irrelevant, immaterial and incompetent.]

Amendment allowed by consent Jan. 23, 1941.

JAMES ALGER FEE

Defendants admit the authenticity of Plaintiff's Pre-Trial Exhibits 4 and 5, but reserve objections on the grounds that same are irrelevant, immaterial and incompetent.

Plaintiff's Pre-Trial Exhibits 6, 7 and 8 are sealed in an envelope and the envelope containing

them is committed to the custody of the Clerk and not to be produced by him except at the trial and not to be opened at any time except on order of the Court. All objections to any of said Exhibits 6, 7 or 8 are reserved to the defendants.

The following exhibits were offered by defendants at the pretrial and identified. [77]

Defendants' Pretrial Exhibit A—Copy of Petition for Probate of the will of Henderson Brooke Deady.

As to Exhibit A, the plaintiff admitted the authenticity of the document* but reserved his objections to its receipt in evidence on the ground that it is wholly irrelevant and immaterial to any issue in the case and incompetent to prove any issue in the case, and that any petition of the probate of a will can have no evidentiary value as to the intention of

*The plaintiff in admitting the authenticity of any documents merely admitted that they were made and signed and bore the signatures and have the contents shown in the copies, but did not admit or concede that they are receivable in evidence or that the documents themselves are binding upon any of the parties signing them or to whom they may have been addressed or by whom they may have been written. Plaintiff also admitted that where an instrument on its face purports to have been filed in a court that it was filed in that particular court and agreed that when copies have been produced whose authenticity is agreed upon, that plaintiff does not demand that the original be produced, and if received the copies may be received with the same force and effect as though the original had been produced.

the testator drawing another and different will or to bind either the decedent named in the petition for probate or his successors in interest or title.

Defendants' Pretrial Exhibit B—Copy of Inventory and Appraisement of the Estate of Henderson Brooke Deady.

With regard to Exhibit B, the plaintiff conceded the authenticity of the document and reserved the same objections on the same grounds as stated as to the previous exhibit.

Defendants' Pretrial Exhibit C—Copy of Complaint for divorce, with agreement attached thereto, in the case of Henderson Brooke Deady v. Amalie B. Deady.

As to Exhibit C, the plaintiff concedes the authenticity of the document, but reserved objections to its receipt in evidence on the ground that it is irrelevant and immaterial to any issue in the case, incompetent to prove any issue, and that the same does not constitute any act on the part of the decedent Henderson Brooke Deady which would in any wise limit, change or destroy the estate which he may have received under the will of his mother, Lucy A. H. Deady.

Defendants' Pretrial Exhibit D—Copy of Amended Complaint Marye T. Deady v. Henderson Brooke Deady, et al.

As to Exhibit D, the plaintiff conceded the authenticity of the document, but reserved objections to

its receipt in evidence on the ground that it is irrelevant and immaterial to any issue in the case and incompetent to prove or disprove any issue in the case or to change [78] in any way the rights of the parties or to limit, change or destroy the estate of Henderson Brooke Deady.

Defendants' Pretrial Exhibit E—Copy of compromise agreement between Marye Thompson Deady, Henderson Brooke Deady, et al.

As to Exhibit E, plaintiff conceded the authenticity of the document, but reserved objections to its receipt in evidence upon the ground that it is immaterial and irrelevant to prove or disprove any issue in the case and incompetent to prove any issue in the case or to change the rights, interest and estates of the decedent, Henderson Brooke Deady.

Defendants' Pretrial Exhibit F—Copy of Order of Multnomah County Probate Court of April 21, 1924, determining state inheritance tax in Lucy A. H. Deady estate.

As to Exhibit F, plaintiff conceded the authenticity of the document and reserved objections as to its relevancy, materiality and its competency to prove any issue of the case or to change, modify or destroy any estate or interest of the decedent, Henderson Brooke Deady.

Defendants' Pretrial Exhibit G—Unexecuted agreement between Charlotte Howell Deady, Hanover Deady, et al, dated October 22, 1934.

As to Exhibit G, plaintiff conceded it was the original but objected to it as irrelevant and immaterial, incompetent to prove any issue in the case, it being a non-executed document, one which was made in the matter of a proposed compromise settlement between Charlotte Howell Deady and Hanover and Matthew F. Deady and their respective wives which never became effective and which was canceled and terminated. [79]

Defendants' Pretrial Exhibit H—Copy of Affidavit of Henderson Brooke Deady, dated October 29, 1925.

As to Exhibit H, the plaintiff conceded the authenticity of the document, reserved objections to the relevancy and materiality of the same or its competency to prove or disprove any issue in the case or to change, modify or destroy the estate of Henderson Brooke Deady in the property in question.

Defendants' Pretrial Exhibit I—Copy of Stipulation, Lucy A. H. Deady, Estate, dated October, 1924.

As to Exhibit I, the plaintiff conceded the authenticity of the documents, but reserved his objection to the relevancy and materiality thereof and their competency to establish any issue in the case or to

change, modify or destroy any estate in Henderson Brooke Deady.

Defendants' Pretrial Exhibit J—Copy of Stipulation, Lucy A. H. Deady Estate, dated December 18, 1923.

As to Exhibit J, the plaintiff conceded the authenticity of the documents but reserved his objection to the relevancy and materiality thereof and their competency to establish any issue in the case or to change, modify or destroy any estate in Henderson Brooke Deady.

Defendants' Pretrial Exhibit K—Copy of Stipulation, Lucy A. H. Deady Estate, dated August, 1931.

As to Exhibits K, the plaintiff conceded the authenticity of the documents, but reserved his objection to the relevancy and materiality thereof and their competency to establish any issue in the case or to change, modify or destroy any estate in Henderson Brooke Deady.

Defendants' Pretrial Exhibit L—Copy of Stipulation for Settlement of Inheritance Tax in Lucy A. H. Deady Estate, dated September, 1935.

As to Exhibit L, plaintiff admitted the authenticity of the document, but reserved objections to the relevancy and materiality thereof and the competency of the same to prove or disprove any issue

in the case or to change, modify or destroy the estate of Henderson Brooke Deady, that of Charlotte Howell Deady, or plaintiff Richard [80] Howell.

Defendants' Pretrial Exhibit M—Copy of Petition for determination of Inheritance Tax in Lucy A. H. Deady Estate, filed Oct. 1, 1935.

As to Exhibit M, plaintiff admitted the authenticity of the document, but reserved objections to the relevancy and materiality thereof and the competency of the same to prove or disprove any issue in the case or to change, modify or destroy the estate of Henderson Brooke Deady, that of Charlotte Howell Deady, or plaintiff, Richard Howell.

Defendants' Pretrial Exhibit N—Copy of Order fixing Inheritance Tax in Lucy A. H. Deady Estate, dated October 1, 1935.

As to Exhibit N, plaintiff admitted the authenticity of the document, but reserved objections to the relevancy and materiality thereof and the competency of the same to prove or disprove any issue in the case or to change, modify or destroy the estate of Henderson Brooke Deady, that of Charlotte Howell Deady, or plaintiff, Richard Howell.

Defendants' Pretrial Exhibit O—Copy of letter of May 16, 1935, From Oregon State Treasurer to First National Bank.

As to Exhibit O, the plaintiff admitted the authenticity of the document but reserved his objections

to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in the premises in question.

Defendants' Pretrial Exhibit P—Copy of letter of May 23, 1935, from Robert F. Maguire to First National Bank.

As to Exhibit P, the plaintiff admitted the authenticity of the document but reserved his objections to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in [81] the premises in question.

Defendants' Pretrial Exhibit Q—Letter of November 25, 1923, from R. W. Wilbur to Joseph Simon.

As to Exhibit Q, the plaintiff admitted the authenticity of the document but reserved his objections to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in the premises in question, and made the further objection that

correspondence between the writers thereof could have no effect upon the rights of the party, wholly incompetent.

Defendants' Pretrial Exhibit R—Carbon copy of letter dated October 26, 1923, from Joseph Simon to Wilbur, Beckett & Howell.

As to Exhibit R, the plaintiff admitted the authenticity of the document but reserved his objections to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in the premises in question, and made the further objection that correspondence between the writers thereof could have no effect upon the rights of the party, wholly incompetent.

Issues of Fact

1.* Whether or not, upon the death of Lucy A. H. Deady, Henderson Brooke Deady became vested with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, in fee simple absolute, subject to certain charges and encumbrances, but not subject to be defeated by his death thereafter without issue. In determining this ultimate

*Defendants contend that this issue should be included as an issue of law only and that the determination of whether or not this is actually an issue of ultimate fact constitutes a preliminary issue of law.

issue of fact, certain other issues are included. These issues may be stated as follows. [82]

1a.** Whether or not Lucy A. H. Deady intended by her will to devise to Henderson Brooke Deady an estate in Lot 1, Block 212, City of Portland, in fee simple absolute in the event he should survive her.

1b.** Whether or not by paragraph seventh of her will Lucy A. H. Deady intended to provide for disposition of said property in the event of the death of Henderson Brooke Deady prior to her own death.

1c.** If not, then whether or not Lucy A. H. Deady intended by her will to give Henderson Brooke Deady only a defeasible fee in said property, subject to be defeated in favor of Hanover Deady and Matthew Edward Deady by the death of Henderson Brooke Deady under the circumstances under which it occurred.

2. Whether or not there has been any waiver, estoppel or election which would prevent plaintiff from asserting that at the death of Lucy A. H. Deady, Henderson Brooke Deady became vested with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, in fee simple absolute, subject to certain charges and encumbrances

**Plaintiff claims that these issues have been already determined in his favor by the court on its ruling on defendants' motion to dismiss, and whether or not they have been so determined, constitutes a preliminary issue of law.

but not subject to be defeated upon the death of Henderson Brooke Deady thereafter without issue.*** This ultimate issue embodies a determination of the following issues:

2a. Whether or not Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady, Joseph Simon (mentioned in the will by Lucy A. H. Deady) and the defendant The First National Bank and Charlotte Howell Deady (mentioned in the will of Henderson Brooke Deady), and [83] Robert H. Strong, the Executor of the Estate of Henderson Brooke Deady, construed the will of Lucy A. H. Deady to mean, and said Lucy A. H. Deady to intend by said will, that Henderson Brooke Deady, upon the death of the testatrix, received only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated by his death without leaving issue.

2b. Whether or not Henderson Brooke Deady, from the death of Lucy A. H. Deady to the time of

***To this issue and to each of the following purported issues of fact, plaintiff objects on the ground and for the reason that each of these issues are predicated on wholly incompetent, irrelevant and immaterial evidence, and that even if each issue be answered in the affirmative, the facts so found would not affect or diminish the title of plaintiff or his predecessors in title, and said facts would not be competent, relevant or material to establish any defense to this suit. This objection is made as a continuing one to each of the following issues of fact.

his death, represented to the defendants Hanover Deady and Matthew Edward Deady that Lucy A. H. Deady, by her will, intended to and did give him (Henderson Brooke Deady) only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, which would be defeated in favor of Hanover and matthew upon Henderson's death thereafter without leaving issue, and that under the will of said Lucy A. H. Deady he received such an estate in said property, and that upon his death without leaving issue his interest in the property would go to them, subject to the power of appointment in favor of his wife given him in said will.

(i) If so, whether or not Henderson Brooke Deady intended that Hanover Deady and Matthew Deady should act on said representations.

(ii) If so, whether or not Matthew Edward Deady and Hanover Deady did act thereon, and if they did act thereon, then

(iii) Whether or not their action was to the benefit of Henderson Brooke Deady, and

(iv) Whether or not their action was to their own detriment.

2c. Whether or not Henderson Brooke Deady acquiesced in the interpretation of the will, set out in Issue No. 2b supra, and elected to accept that interest and waived any other interest.

2d. Whether or not the Executor of the Estate of Henderson Brooke Deady accepted and acquiesced in the interpretation of the will of Lucy A. H. Deady set out in Issue No. 2b supra.

2e. Whether or not from the death of Lucy A. H. Dedy in [84] August, 1923, up to the bringing of this suit in July, 1936, the plaintiff and the persons through whom he claims knew that the executors of the estate of Lucy A. H. Dedy and the defendants herein considered and were acting upon the basis that Henderson Brooke Dedy received under the will of Lucy A. H. Dedy only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, together with the power of appointment given him in said will.

2f. Whether or not any claim was made by plaintiff or any person through whom he claims, that Henderson Brooke Dedy received under said will any estate in said property other than a defeasible fee as set out in issue number 2b.

2g. Whether or not any such claim was made prior to the death of the attorney who prepared the will, the witnesses thereto, the executors named in said will and other persons having information and knowledge concerning, and who would be able to give and would give testimony to meet the issues raised by the amended complaint; also

Whether or not any such claim was made prior to the loss or destruction of any irreplaceable material documentary or other evidence bearing on said issues.

Issues of Law

1.* Whether or not Lucy A. H. Deady, by the language used in her will, intended to give Henderson Brooke Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated in favor of Hanover Deady and Matthew Edward Deady by Henderson Brook Deady's death under the circumstances under which it occurred.

2.* Whether or not the fact that the estate of Henderson Brooke Deady has not been closed and that no order has been entered therein taking the right to possession of or to the rents and profits from [85] Lot 1, Block 212, City of Portland, Oregon, from the executor of the Estate of Henderson Brooke Deady, bars this suit.

2a.* Whether or not Robert H. Strong, executor of the estate of Henderson Brooke Deady, deceased, is a necessary party to this suit.

3.* Whether or not this suit is barred by the Statute of Limitations.

4.* Whether or not this suit is the contest of the validity of a will within the meaning of Oregon Code 1930, Sec. 11-207, and if so, whether or not this suit is barred by said statute.

*By the inclusion of this issue and subsequent preliminary issues of law (issues numbered 1-4 inclusive), in the pretrial order, plaintiff does not waive his right to claim that the law of the case including this issue of law has been determined by the court's ruling on the motion to dismiss, and that this issue is not now properly before the court.

5. Whether or not by the last will and testament of Lucy A. H. Deady, deceased, Henderson Brooke Deady became vested in fee simple absolute in two-thirds of Lot Numbered 1, in Block numbered 212, City of Portland, Oregon.

6. Whether or not by virtue of any devise or bequest from Henderson Brooke Deady to Charlotte Howell Deady and any devise or bequest from Charlotte Howell Deady to the plaintiff herein, said plaintiff is now the owner in fee simple of said two-thirds interest in Lot numbered 1, in Block numbered 212 of the City of Portland, Oregon.

7. Whether or not paragraph seventh of the last will and testament of Lucy A. H. Deady provided for the contingency of the death of Henderson Brooke Deady only prior to the death of the testatrix.

8. If paragraph seventh of said last will and testament did not provide only for the contingency of the death of Henderson Brooke Deady prior to the death of Lucy A. H. Deady, then whether or not such provision was invalid and void under the rule against perpetuities.

9. Whether or not plaintiff is estopped from asserting any right to or interest in said Lot 1, Block 212, City of Portland.

10. Whether or not plaintiff is barred by laches from asserting in this suit any right to or interest in said Lot 1, Block 212, City of Portland.

11. Whether or not the plaintiff is the true owner in fee simple [86] absolute of an undivided

two-thirds of Lot 1, Block 212, City of Portland, and is immediately entitled to the joint control, management and operation thereof with the defendants Matthew Edward Deady and Hanover Deady, and to two-thirds of the income therefrom less such testamentary charges and legacies as the court may find to exist at the date of its decree.

12. Whether or not the defendant, The First National Bank of Portland, is without lawful or any right to manage, operate or control or to interfere with the management, operation or control of said real property, or to collect and receive or disburse any of the income therefrom, as trustee or in any other capacity whatsoever.

13. Whether or not the limitations on the power and disposition of said real property as contained in clause Sixth of said will are invalid and of no force and effect.

14. Whether or not the direction for the accumulation of a sinking fund from the income of the property for the payment of the mortgage contained in said last will and testament of Lucy A. H. Deady is invalid and void under the rule as to perpetuities.

15. Whether or not paragraphs fifth, sixth, eighth and ninth of said last will and testament are invalid and void.

16. Whether or not plaintiff has a plain, speedy and adequate remedy at law.

17. Whether or not the court should:

(a) Order, direct and decree a full and complete discovery of the facts referred to herein and

requiring defendants and each of them to render herein a true and correct accounting of all moneys which they or either of them have received as income from the said Lot 1, Block 212, City of Portland, since the decease of Charlotte Howell Deady, being the 12th day of July, 1935.

(b) Award to this plaintiff judgment against the defendants, and each of them, or any of them, for two-thirds of the income from said real property, since the said 12th day of July, 1935, less proper [87] deductions for payment of indebtedness, taxes, legacies, expenses of administration and other costs which, after the accounting is had herein, may appear to the court to be just and proper charges to be deducted from plaintiff's share of said income.

(c) Appoint a receiver to assume the management, operation and control of said real property and to collect and receive and hold the rents, profits and income from said real property, subject to the orders and supervision of this court pending the accounting and final disposition of the cause, or as the alternative, impound in the hands of the defendant, The First National Bank, all moneys derived from said real property, or which might be derived from said real property, or which might be derived therefrom during the pendency of this cause and prior to said accounting and restrain and enjoin the defendant, The First National Bank, from paying out or disbursing any of said money except as may be specifically ordered by the court or stipulated and consented to by the plaintiff.

The facts, contentions and issues having been determined, the foregoing is hereby made and entered as the pretrial order in this suit and the case is set for trial on the 21 day of January, 1941.

Done and dated this 23d day of December, 1940.

JAMES ALGER FEE

Judge

Approved:

DONALD K. GRANT

Of Attorneys for Plaintiff

EDGAR FREED,

NICHOLAS JAUREGUY

Of Attorneys for Defendants

[Endorsed]: Filed December 23, 1940. G. H. Marsh, Clerk. [88]

And afterwards, to wit, on the 21st day of May, 1941, there was duly filed in said Court, an Opinion on Admission of Evidence, in words and figures as follows, to wit: [89]

[Title of District Court and Cause.]

MEMORANDUM ON ADMISSION OF EVIDENCE

May 19, 1941

Some confusion has arisen in the minds of counsel over the interpretation of the will by the court, in the opinion on motion to dismiss. A rechrystallization of the decision may, therefore, be of moment.

The court held, taking the will by its four corners,

that the clear intention of the testatrix was, first to give two thirds of the real property in fee simple to her son, Henderson Brooke Deady and one third jointly, by like title, to her grandsons, Hanover and Mathew Edward Deady; and second, to control the disposition of the income from the whole property for a period of at least twenty-five years. In the third place, based upon these clear objectives, the court found a desire to substitute Hanover and Mathew Edward Deady for Henderson Brooke Deady as fee devisees, upon death of the latter during her life time without children. In the fourth place, although the court found the will required construction in order to discover intent, no ambiguity latent or patent, with regard to the devolution of title, was discovered. These findings will now be reviewed in this order. [90]

As to the first point, the intent to give a fee simple to Henderson to two thirds of the real property was shown by many factors. He was her sole surviving, and apparently favorite son. Another parcel is given to him in fee simple. He is principle legatee, one of the residual legatees, and trustee and executor. His estate was incumbered expressly with the identical "conditions, provisions and charges" and only those, which incumbered the estates given the grandsons, which latter were admittedly in fee simple. It is further provided that after ten years, the division of the income shall "follow the title and ownership of said real property" and be distributed two thirds to Henderson

Brooke Deady and one third to the grandsons. The residuary estate is given two thirds to Henderson and one third to Hanover and Matthew.

Everyone admits the son received this portion of the property in fee, but defendants claim this title was defeasible. This clear intention to give him fee simple title was mirrored in the will, since the Oregon rule requires that when a fee simple is given in a prior clause, such title shall not be cut down by words of doubtful import in a subsequent clause.¹ [91]

The second clear purpose of the will was to prevent alienation of the property for twenty-five years and to keep the property intact to pay off the mortgage. Mrs. Deady, had, by her acumen, turned this realty into a paying piece of property and unquestionably wished it held intact and desired her devisees to deal with the income rather than with the title. These provisions would have violated the rule against perpetuities if devolution of the realty was based thereon. The cognate rule against prolonged restrictions on alienation was violated thereby.

Third, upon these clear objectives, the court found the words whereby, the grandsons claim to obtain a fee simple interest in the two thirds of the property given to Henderson Brooke were of doubtful import. To the lay mind these words might in-

1. *Irvine vs. Irvine* 69 Oregon 187, 190, *Imbrie vs. Hartrampf* 100 Oregon 589, 596.

dicate, if viewed without the context, that the fee was to pass any time Henderson died without issue. But the draughtsman was a lawyer, who must have been acquainted with the Oregon rule that a fee simple given in one clause can not be cut down without a clear cut expression in a subsequent clause. He must have also known that by the great weight of American authority the words used, imported a "substitutionary intent." The court gave full weight to the opinions of the Supreme Court of Oregon in construing similar wills. The court noted that the life of Henderson was not used as the time for devolution of the title. The intent not to make the expiration of the trust and shackle on alienation, the time of devolution was also noted. This period was beyond a life or lives in being plus twenty-one years and the period [92] of gestation, so that an executory devisee dependant thereon would have been void. Construed according to the canons, no other solution was possible but to find Henderson held fee simple title, if he outlived his mother. All through the opinion, the court refers to and follows the principle enunciated by the Oregon court and the statutes of the state that the intention of the testatrix gathered from the will as a whole, without strict regard for the canons of construction, was binding. Although an attempt was made to reconcile the finding with the canons and the Oregon cases, the court ultimately found the intention of Mrs. Deady was to give a fee simple title to two thirds of the real property to her sole

surviving son Henderson Brooke Deady, if he outlived her.

Finally, nowhere in the opinion of this court is it indicated that the will contains ambiguities, either patent or latent, regarding title to the real property, although it is noted that if the draughtsman had made the gift to Henderson, dependent not only upon the "conditions, provisions and charges" as was the gift to the grandsons, but had added "and subject also to the executory devise", a different result might have followed. Clarity of interpretation might also have resulted from an addition to the words of the Seventh Clause of the Will as follows: "Seventh, That in the event my son Henderson Brooke Deady die without issue during my lifetime," then to the grandsons. There was a problem of construction, but no ambiguity so far as the devolution of the real property is concerned. [93]

The will is before the court. The general rule is that explanation, remarks or declarations of intention by the testator will not be received to explain, modify or vary the construction of a testament.¹ The formalities surrounding the execution of a will could be thus entirely destroyed.

There is nothing in the Oregon cases in contravention of that rule. In *Stubbs vs. Abel*, 114 Oregon

1. *Hansen vs. Oregon Humane Society* 142 Oregon 104, 118. *Re Estate of Hodgkin* 110 Oregon 381. *Closset vs. Burtchaell* 112 Oregon 585. *Stubbs vs. Abel* 114 Oregon 610. *Soules vs. Silver* 118 Oregon 96.

610, 621, the court construed the will in the light of the surrounding circumstances but did not specifically pass upon declarations of a testator. In *Schramm vs. Burkhart* 137 Oregon 208, 212-3, the court did give weight to oral declarations to prove a contract upon which joint and mutual wills between husband and wife were based. But this is an entirely different doctrine and has nothing to do with the interpretation of wills not so based. See OCSA § 2-206 *Holman vs. Lutz* 132 Oregon 185. In *Crown Company vs. Cohn* 88 Oregon 642, 652 the court found a latent ambiguity and used expressions of the trustor and testimony of the surrounding circumstances to clear the matter up.

Since the court here held that there was a clear purpose to give a fee simple title to Henderson on the face of the will none of these authorities are opposed to the construction placed upon the will. [94]

The oral expressions of Lucy A. H. Deady are rejected. The problem of construing wills is to find the intention of the testator by a consideration of the language used. Certainly, if there be doubt about identification of an article or person, testimony can be adduced to show this feature.¹ At times, also certain surrounding circumstances may be shown. But the very purpose of requiring formalities in the promulgation of a testament is to prevent the use of loose expressions of the testator to found

1. *Soules vs. Silver*, *supra*.

property rights. The scientific language used by lawyers is a guard against this very thing. Unless it be assumed that the lawyer was incompetent, such expressions must be taken to import the intention supported by the great weight of authority and to express the desire of the testator. Furthermore, dispositions which violate the legal limitations can not be assumed to have been intended by the lawyer, although a vague desire of the testator may have pointed in that direction. There is no ambiguity in the words "die without issue" even though different courts have fixed different periods to give the words effect. If oral declarations of a testator could be used here, such expressions can be used any time a problem of construction of a will arises, which is not the case.²

Lucy A. H. Deady did not know and could not have forecast the situation with which the court is now confronted. The court certainly is not required, nor even permitted to find the intention she would have if she were writing her will today. If she had given Henderson title to two thirds of [95] this real property outright and he had sold it to a

2. "Since the nature or extent of the estate or interest devised is determined by the legal effect of the language of the will, this question must be determined by the process of construction according to established legal principles, and evidence of the testator's declaration of intention is not admissible to show the character or quantum of estate intended to be devised." Note 94 A. L. R. 269, and cases there cited.

stranger, it would not have been thought inequitable. The mere fact that the son observed a restraint on alienation and the title has come into the hands of a stranger to her family should not warp the judgment. The situation must be judged, as she viewed it at the time.

Inasmuch as there is a possibility that the court might be required to admit this evidence under Rule 43 (a), it will be viewed as if admitted in order to determine relevancy. It is entirely consistent with the interpretation of the language of the will. Mrs. Deady said she was going to give the property to Henderson "because he was her son and she thought it was only fair and right to put it that way in the will". It is true that Hanover reporting this speech twenty years later couples the gift with the words "if he had children". If that slight change had been made in the will and these two clauses had been so wedded, a different result might have been reached. But Hanover is vitally interested and conceding utmost good faith, his recollection may have distorted these conversations. It is very significant that Mrs. Deady, at such times, declared that she knew Henderson could have no children and that she hoped Amalie would not give him a divorce and that he was a sick man. Even in the form in which these expressions come to the court, through the veil of time and the recollection of a witness, there is a suggestion that Mrs. Deady believed Henderson might die during her lifetime and without issue. The statements that the prop-

erty would come to Hanover and Matthew [96] someday might have been so conditioned. It is certain that she was impelled by a desire to have the property kept intact as a monument to Judge Deady, which is one of the clear expressions of the will. The other is, that however much she disapproved of her son's course of action, she thought it was "only fair and right" to give him a major share in the property. The addenda "if he had children" may have been coupled with the forgotten expression "during my life". She did unquestionably express affection for her grandson and regard for their welfare but this might as well have been fulfilled by a gift of one third of the property as, of the whole.

The next question is whether acts and agreements by the parties done after the death of the testator are admissible. The written stipulations of the parties, and papers filed in courts have some relevancy to the interpretation of the instrument placed thereon by the parties themselves. In *Stubbs vs. Abel*, *supra* the court admitted and considered a petition filed by one of the beneficiaries of a trust, wherein he placed a construction upon his interest. The court sounded a warning to the effect that such interpretations were not binding on the court. The question here is admissibility and not weight. The court therefore generally considers these documents admissible.

The matters relating to a claim presented by the State Treasurer for inheritance tax are rejected

for the reason that there was only one claim advanced by the State [97] and liability upon this was admitted by the estate. What relevancy this might have is inconceivable. The State Treasurer raised only the question of the tax due from the estate upon the income paid to Charlotte. The interests of all connected with the estate were the same. No one wanted to pay any more tax than the law required. The State will not be foreclosed from collecting what the law allows.

The inventory and appraisement of the estate of Henderson is also rejected together with the petition for the appointment of an administrator. The only possible relation these documents could have to the situation is to show how someone else may have construed the will. But the administrator may have believed he had no duty in relation to this real property since he could not get possession under Mrs. Deady's will. Whatever he thought or did is immaterial and irrelevant.

Oral declarations of Henderson are admitted. This may be justified either on the theory that plaintiff derives whatever title to real property which he may have from Henderson and therefore any declaration of Henderson's while holding the title is evidence against plaintiff (O. C. L. A. 2-206) or on the theory that such declarations may form a foundation for estoppel against Henderson and therefore against plaintiff, or possibly on other grounds. See O. C. L. A. 2-210 and 2-208. However, the expressions of Henderson are not admitted upon

the ground that there is patent or latent ambiguity in the will, nor as an aid to construction thereof. [98]

However, conversations with other people besides Henderson are not admissible. Nor is the understanding or construction of any other person admissible upon that ground alone. In using these conversations the court will give them but slight weight when not incorporated in a written document which is under discussion at the time, and give them no weight when in contradiction thereof. But the question now is that of admissibility.

The court admits the statement of Hanover that he relied upon representations of Henderson but reserves the right to weigh the testimony with the circumstances and in the light of the general situation.

A tabulation of the rulings is attached hereto and an appropriate order may be drawn incorporating the substance thereof. [99]

The court adheres to its previous ruling and excludes Defendants Pre-trial Exhibit (a) (certified photostatic copy of Petition for Probate of the will of Henderson Brooke Deady) p. 65.

The court adheres to its previous ruling and excludes Exhibit (b) (certified copy of Inventory and Appraisement of the Estate of Henderson Brooke Deady) p. 66.

The court adheres to its previous ruling excluding testimony as to the background of the subject

matter of conversations between Henderson Brooke Deady and Samuel B. Weinstein, p. 69-70.

The court sustains the objection to testimony of Samuel B. Weinstein regarding conversations with Chester Dolph as to what Henderson Brooke Deady was to receive under the will of Lucy A. H. Deady, p. 72.

The court admits in evidence Defendants Pre-trial Exhibit C (copy of complaint for divorce, with agreement attached thereto, in case of Henderson Brooke Deady v. Amalie B. Deady). p. 87.

The court admits testimony of Samuel B. Weinstein as to conversations with Henderson Brooke Deady. p. 75-81. p. 82.

The court excludes testimony of Samuel B. Weinstein as to whether he relied upon statements of Henderson Brooke Deady as to his interest in the real property in advising Amalie Deady to sign a property agreement in connection with Amalie's and Henderson's divorce, p. 85, p. 87. same ruling.

The court rejects testimony of Samuel B. Weinstein as to discrepancy between agreement and stipulation. p. 92. [100]

The court sustains plaintiff's motion to strike out all the testimony of Samuel B. Weinstein as to conversations and negotiations with Chester V. Dolph. p. 97-143.

The court admits testimony of Samuel B. Weinstein as to conversations and negotiations with Henderson Brooke Deady. p. 97-143.

The court admits testimony of Samuel B. Weinstein as to conversations and negotiations with Henderson Brooke Deady. p. 97-143.

The court admits testimony of Samuel B. Weinstein as to conversations and negotiations with Henderson Brooke Deady. p. 97-143. Defendant's Exhibit C is admitted, see *supra* p. 87.

The court sustains plaintiff's objection to Hanover Deady's testimony as to conversations with Lucy A. H. Deady regarding the property. p. 149, 150, 151, 152.

The court overrules plaintiff's objection to Hanover Deady's testimony as to conversations with Henderson Brooke Deady. p. 157.

The court overrules plaintiff's motion to strike Hanover Deady's testimony in regard to conversations with Henderson Brooke Deady relating to stipulations embodied in Defendant's Pre-trial Exhibits. I and J. p. 161.

The court overrules plaintiff's objection to Defendant's Pre-trial Exhibits I (certified photostatic copy of stipulation, Lucy A. H. Deady Estate dated December 18, 1923) and J (certified photostatic copy of stipulation, Lucy A. H. Deady Estate, dated October, 1924, and admits said exhibits in evidence. p. 161.

The court overrules plaintiff's objection to Hanover Deady's testimony as to controversy over real property as set out in stipulation. p. 163.

The court overrules plaintiff's objection on ground that question propounded by counsel was leading. p. 163. [101]

The court overrules plaintiff's objection to testimony of Hanover Deady regarding claim of Marye Thompson Deady. p. 164.

The court sustains plaintiff's objection to Hanover Deady's testimony regarding conversations had by Mary T. Deady with Mr. Simon and his mother (Mary E. Deady) and also sustains plaintiff's motion to strike such testimony. p. 165, 166.

The court overrules plaintiff's objection to Hanover Deady's testimony regarding conversations between Mary E. Deady and Henderson Brooke Deady in witness's presence. p. 167.

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit D (certified photostatic copy of amended complaint, Marye T. Deady vs. Henderson Brooke Deady, et al. p. 169).

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit E (photostatic copy of compromise agreement between Marye T. Deady, Henderson Brooke Deady, et al). p. 170.

The court overrules plaintiff's objection to testimony of Hanover Deady regarding conversations with Henderson Brooke Deady as to income from the property. p. 171.

The court overrules plaintiff's objection to testimony of Hanover Deady as to his reliance upon statements of Henderson Brooke Deady, p. 171.

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit A

(photostatic copy of affidavit of Henderson Brooke Deady, dated Oct. 29, 1925). p. 178.

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit K (certified photographic copy of stipulation, executed August, 1931, by Henderson Brooke Deady, Joseph Simon, et al.). p. 179. [102]

The court overrules plaintiff's objection and admits testimony of Hanover Deady with regard to Defendant's Pre-trial Exhibit K. p. 180, 187.

The court excludes testimony of Hanover Deady regarding negotiations with Joe Simon leading up to preparation of document which is Defendant's Pre-trial Exhibit K. p. 188-9.

The court excludes testimony of Hanover Deady regarding discussion with Ralph Wilbur. p. 193.

The court overrules plaintiff's stipulation to testimony of Hanover Deady regarding his **reliance upon** statement made by Henderson Brooke Deady, p. 194.

The court overrules plaintiff's objection to testimony of Hanover Deady regarding his signing of the stipulation (Ex. K.)

The court overrules plaintiff's objection and admits evidence Defendant's Pre-trial Exhibit G (copy of unexecuted agreement between Charlotte Howell Deady, Hanover Deady, and others, dated Oct. 22, 1934). p. 195.

The court adheres to its ruling in regard to the substitution of the original for the copy of Exhibit G p. 196. This matter is later cleared up by the introduction of the original.

The courts rulings on the letter of Wilbur, Beckett, Howell, and Oppenheimer to Joseph Simon, July 10, 1933, is made immaterial by subsequent action of counsel in withdrawing it. pp. 215, 227, 229-32, 238.

The court adheres to its previous ruling denying Plaintiff's motion to strike out testimony of Hanover Deady. p. 235.

The court adheres to its previous ruling overruling defendant's objection to question propounded to Hanover Deady on ground it had already been answered. p. 239. [103]

The court adheres to its previous ruling and admits testimony of Hanover Deady as to conversations with Robert Strong. p. 247.

The court adheres to its previous ruling admitting testimony of Hanover Deady regarding conversations with Joseph Simon. p. 248½.

The court adheres to its previous ruling denying plaintiff's motion to strike the testimony of Hanover Deady regarding conversation with Joseph Simon. p. 250-51.

The court adheres to its previous ruling admitting testimony of Jessie Murch as to whether or not she had conversations with Mrs. Lucy A. H. Deady. p. 256-7.

The court adheres to its previous ruling allowing Jessie Murch to answer counsel's question as to first time Mrs. Lucy A. H. Deady discussed matter with her. p. 257.

The court adheres to its previous ruling striking unresponsive answer of Jessie Murch. p. 257-58.

The court adheres to its previous ruling sustaining plaintiffs' objection to question asked Jessie Murch and testimony as to what Mrs. L. A. H. Deady said. p. 258-9.

The court sustains plaintiff's objection to Blanche Catlin's testimony regarding conversations with Mrs. Lucy A. H. Deady, p. 265.

The court adheres to its ruling refusing to strike answer of Blanche Catlin as being unresponsive. p. 268.

The court sustains plaintiff's objection to testimony of Ariel Deady regarding conversations with Mrs. Lucy A. H. Deady. p. 274.

The court overrules plaintiff's objection to testimony of Ariel Deady regarding conversations with Henderson Brooke Deady. p. 277-9. [104]

The court sustains plaintiff's objection to testimony of Mrs. Helen Hanson regarding conversations with Mrs. L. A. H. Deady. p. 282.

The court sustains plaintiff's objection to testimony of Matthew Deady regarding conversations with Mrs. Lucy A. H. Deady. p. 287.

The court grants plaintiff's motion to strike question and answer of Matthew Deady as to presents of Mrs. L. A. H. Deady. p. 288.

The court overrules plaintiff's objection to testimony of Matthew Deady regarding conversation of Mrs. L. A. H. Deady about Uncle Paul, the answer being no. p. 288-0

The court sustains plaintiff's objection to Matthew Deady's testimony regarding statements of Mrs. L. A. H. Deady about "When this property becomes your and Hanover's," etc. p. 290.

The court does not rule on plaintiff's objection to Matthew Deady's testimony regarding a letter from his brother because no ruling was requested and the line of testimony was abandoned. p. 292.

The court sustains plaintiff's objections and excludes from evidence Defendant's **Pre-trial Exhibits**:

F. (Copy of Order of Multnomah County Probate Court of April 21, 1924, determining state inheritance tax in Lucy A. H. Deady estate) p. 301.

L. (Copy of stipulation for settlement of inheritance tax in Lucy A. H. Deady estate, dated Sept., 1935.) p. 302-3.

M. (Copy of petition for determination of inheritance tax on Lucy A. H. Deady, estate, filed Oct. 1, 1935.) p. 304.

N. (Copy of Order fixing inheritance tax on Lucy A. H. Deady estate, dated Oct. 1, 1935. p. 304.

O. Copy of letter May 16, 1935, Oregon State Treasurer to First National Bank. p. 305. [105]

P. Copy of letter May 23, 1935, Robert F. Maguire to First National Bank. p. 305.

Q. Letter Oct. 25, 1923, Wilbur, Beckett, & Howell to Joseph Simon, p. 306-8.

R. Carbon copy of letter Oct. 26, 1923, Joseph Simon to Wilbur, Beckett and Howell. p. 308-9.

Note: It is understood that where the court has rejected testimony or excluded any documentary evidence, all cross-examination as to such testimony or document is also rejected.

[Endorsed]: Filed May 21, 1941. G. H. Marsh, Clerk, By R. DeMott, Deputy. [106]

And Afterwards, to wit, on the 17th day of November, 1941, there was duly filed in said Court, an Opinion in words and figures as follows, to wit:

[107]

[Title of District Court and Cause.]

OPINION

November 17, 1941

James Alger Fee, District Judge:

This case involves the construction of the will of Lucy A. H. Deady. The court, on motion to dismiss, interpreted the language of the will itself and sustained the complaint. Thereafter, answer was filed. A pre-trial conference was held. Based upon a pre-trial order, the case was tried before the court. Since numerous objections were made to the evidence, the court has heretofore issued an opinion dealing with questions of admissibility.

The facts are as follows:

At the time of the execution of her last will,¹

1. The will is printed in full in the former opinion of the court on a motion to dismiss, filed November 6, 1939.

Lucy A. H. Deady was 86 years of age, and at the date of her death, August 29, 1923, her age was 89 years. At the time of the execution of her will, and also at the time of her death, she had one living child, Henderson Brooke Deady, and two deceased children, Paul R. Deady and Edward N. Deady; three daughters-in-law, Amalie B. Deady (then the wife of Henderson Brooke Deady), Marye Thompson Deady [108] (widow of Paul R. Deady), and Mary E. Deady (widow of Edward N. Deady); two grandchildren, Matthew Edward Deady and Hanover Deady, children of Edward N. Deady. At the time of the execution of Lucy A. H. Deady's last will, Henderson Brooke Deady was 51 years of age, Matthew Edward Deady was 31 years of age, and Hanover Deady was 28 years of age. At that time Henderson was, and for a long time had been, living apart and separated from his wife, Amalie B. Deady.

At the time of her death Mrs. Deady was seized of the real property in question. Letters testamentary were issued to Henderson and Joseph Simon, September 15, 1923. Controversy seems to have sprung up immediately, concerning the distribution of money and the ownership of the property, between Henderson and Hanover. Wilbur, the attorney for Henderson and Matthew Edward wrote a letter to Joseph Simon, October 25, 1923, setting up a claim that the grandsons would be entitled to the whole estate on Henderson's death, and Joseph Simon answered October 26, 1923. The stipulation

settling a temporary schedule of disbursements was executed December 18, 1923. Marye Thompson Deady, thereafter, commenced suit September 3, 1924, claiming a portion of the real property, and as a result, apparently, a second stipulation was executed for temporary distribution in October, 1924. Thereafter, when considerable negotiation had been carried on between Henderson and Amalie B. Deady, a divorce suit was filed by the former and based upon a property settlement, dated September 14, 1925, decree entered therein. Marye Thompson Deady's suit was settled by the stipulation dated October 28, 1925, a document which clears the executors and [109] created a trust for the life of Marye Thompson Deady. Upon the day after, October 29, 1925, Henderson executed an affidavit to the effect that at that time he had no children. A great deal of negotiation was then carried on by Henderson and Hanover in the effort by Henderson to get consent to the payment of his share of the income to Charlotte Howell if he should die before the expiration of the six months after the date of his divorce decree from Amalie. The refusal of Hanover caused a violent quarrel. Henderson then left Portland and did not return. Shortly thereafter he married Charlotte Howell Deady. In 1931 another stipulation was signed as to distribution of the income by the executors.

Henderson died May 28, 1933, leaving no issue him surviving. He left a will which made no spe-

cific mention of this property, but named Charlotte Howell Deady as residuary legatee and appointed her to his share of the income of his mother's estate, in accordance with the provisions of his mother's will. Henderson's will was probated July 18, 1933. The estate has not yet been closed. Hanover was immediately interested in obtaining a definite expression as to how much money Charlotte Howell Deady would be entitled to under the appointment of Henderson. The result of this was that a compromise agreement was sent to her by Mr. Wilbur, which she refused to sign. Another document of settlement, both as to title and the income, was forwarded to her by Hanover's attorneys. This she signed October 11, 1934. On its return Matthew Edward signed but subsequently Hanover refused to execute it.

Joseph Simon died February 14, 1936, and The First National Bank was appointed and qualified as executor February 27, 1935. Charlotte Howell Deady died July 12, 1935. [110] Her will, probated July 22, 1935, makes no mention of this specific property, but designates Richard Howell, her son, as her residuary legatee. This estate is still unclosed.

The mortgage on the property in question was in the amount of \$40,000 at Mrs. Lucy A. H. Deady's death, and has been extended several times, and, on July 6, 1935, was still unpaid in the sum of \$29,000.

On March 6, 1935, the estate of Mrs. Lucy A. H. Deady was closed and The First National Bank

discharged as executor. Since then the defendants have held the property and denied any claim of the plaintiff thereto.

The court by construction of the will itself, exclusive of other factors, found that the intention of Mrs. Deady was to give to Henderson a fee simple title to an undivided two thirds interest in the real property in question, if Henderson survived her. This fee was encumbered with a restriction against alienation for twenty-five years and until the mortgage could be paid off and also, with the payment of certain definite sums to various persons.

The question of construction of the will by the parties involved is now raised upon the evidence.

Before discussing these issues, it should be noted that there appears inferentially in the record strong evidence of the correctness of the construction placed upon the will by the court.

Henderson, Paul R. and Edward N., sons of Judge and Mrs. Deady, by the will of their father, became at his death, jointly the owners in fee simple of the very real property here in issue, subject only to the life interest of Mrs. Deady. At her request, without consideration, the three sons deeded [111] the fee of this property to her, in order that the building could be erected thereon. This is undenied. Paul R. died without children, Marye Thompson Deady was given a monthly payment under the will, as his widow. Mrs. Lucy A. H. Deady recognized the obligation to Edward N. by giving to his sons, Hanover and Matthew Edward, one third of the real

property in fee subject to the "conditions, provisions and charges". It does not seem consistent to believe that she did not give an unqualified fee when she devised the balance of the property to Henderson, subject to the same "conditions, provisions and charges".

As noted above, Henderson had already held part of the property in fee and had deeded it to her. Unquestionably, she recognized this strong obligation and returned to him the fee which he had deeded to her, together with the interest of his deceased brother, but burdened with the cash payments and the restriction on alienation. This evidence almost conclusively sustains the construction. Because the gift in fee was in satisfaction also of a debt, the court in *Imbrie vs. Hartrampf*, 100 Oregon, 589, 597, says: "While the amount of the indebtedness is not disclosed by the record, it would not seem that the father in the liberal disposition of his bounty to his son, as manifested by the will, would devise a title in fee to land for a consideration in one part of the will and take it away or diminish the title, debase the fee as it is usually termed, in another part." Like considerations compel a like conclusion in the instant case.

But it is contended that either agreements or utterances of the devisees throw light upon the construction of the will.

There are three foundations upon which the court may consider occurrences after the death of Lucy A. H. Deady. First, if the family in written docu-

ments settled the [112] construction of the will or the clauses thereof or, second, if Henderson or Charlotte, as holder of the title in some binding manner placed limitation thereon, or, third, if either of them, when holding title, by false words or acts, misled Hanover and Matthew Edward to the point that it would be inequitable to allow a successor to set up the truth, then the construction of the will heretofore found by the court might be modified accordingly.

The court will consider as to the first ground four documents, signed by legatees and devisees under the will of Lucy A. H. Deady. The second basis will require a consideration of certain documents executed by Henderson and Charlotte Howell Deady. The third ground will require a consideration of the question of whether either Henderson or Charlotte was under a duty to speak or make representations, and what representations either of them made, whether Hanover or Matthew Edward relied thereon and whether damage was caused thereby.

There are four transactions in which the parties interested were involved: (1) the stipulation of December, 1923, (2) the stipulation of October, 1924, (3) the stipulation based on the claims of Marye Thompson Deady, dated October, 1925, (4) the stipulation of August, 1931.

The first stipulation of December 18, 1923, states that there is a dispute "as to whether or not the estate of said deceased shall be distributed as by said will directed and as to the ownership of the

real estate" in controversy here. This document was signed by all the interested parties. Hanover testified that the controversy then pending was the claim of Marye Thompson Deady to one [113] third of the real property in question. But the suggestion as to a stipulation regarding distribution of the income came, on October 26, 1923, from Ralph W. Wilbur, one of the attorneys for Hanover, and in the same letter there is the claim that the grandsons would ultimately come into the title of the whole tract, but no mention of the Marye Thompson Deady claim. Mr. Joseph Simon, the co-executor, in answer to this letter on October 28, 1923, agreed to the stipulation to protect the executors, but answers the claim as to the ultimate title by a suggestion that "all parties interested get together and arrive at some adjustment of their differences and avoid irritation and ill feeling".

It is extremely significant that Mr. Wilbur did not mention the claim of Marye Thompson Deady and that the dispute as to title was then between Henderson and the grandsons. The inference to be drawn is that Henderson, to the knowledge of Hanover and Wilbur, was claiming the fee, but this point was expressly left in abeyance by the document.

The stipulation of October, 1924, carried on the same agreements, except that Henderson, by the terms thereof, received \$100 per month additional. It is true this instrument bears evidence that Marye Thompson Deady was at that time urging her claim,

for in order to get her signature Henderson was required to pay to her \$10 per month out of the additional amount obtained by him. But, it will be noticed that her suit had been filed September 3, 1924, which is some indication that it was not being urged at the time of the first stipulation, executed almost a year before.

The primary purpose of the stipulation of October, 1924, was the settlement of the suit filed by Marye Thompson Deady [114] on September 3, 1924. The salient feature of the stipulation is that it is not and does not purport to be a construction of the will as to the shares acquired by Henderson and the grandsons, but was a new agreement among all the devisees in settlement of the claim made by Marye Thompson Deady that Lucy A. H. Deady had nothing but a life estate in the real property in question. However, the special warranty deed to be executed according to this stipulation is to be made by Marye Thompson Deady to Henderson and to each of the grandsons and not to trustees. This indicated that the title was in the devisees and not in trustees. Furthermore, the deeds are to be made "in proportion to their interests". If this is a construction of the will, the inference would be that Henderson was to get a deed to two-thirds and Matthew Edward and Hanover a deed to one-sixth each, respectively. If this is not the implication, then no claim can be based upon the stipulation except that the grandsons in the face of a dispute over the title did not have it explicitly settled. There

is certainly no implication here that Henderson was yielding to their construction.

The remaining stipulation of August, 1931, refers to the stipulations of December, 1923 and October, 1924, and re-distributes the income during the remainder of the ten year period set up in the will, but certainly has no implications as to construction of the will, or as to the disposition of the real property. It is notable that Marye Thompson Deady did not sign this stipulation, and that the agreement of October 18, 1925, is not mentioned therein.

If all of these "family" documents be considered, it is obvious that none had for its purpose the construction of [115] the will. The initial letters indicate the grandsons were claiming the whole property on Henderson's death. Yet nowhere in the documents is this question settled, nor is it ever mentioned again. Henderson was able to obtain the bulk of the income contrary to the terms of the will and defer the collection of a sinking fund contrary to the terms of the will, notwithstanding the claim advanced by Mr. Wilbur that the bulk of the income should be applied upon the mortgage sinking fund to protect the interest of the grandsons as ultimate devisees. Ably represented as the grandsons were, they would not have turned over the great bulk of the income to Henderson without a definite agreement that the grandsons would come into the property on Henderson's death. On the contrary, it is highly significant that the only document which directly deals with the title uses the

phrase "in proportion to their respective interests."

The most that can be said of this situation is that there was a deliberate failure to interpret the will after a sharp conflict had originally been suggested and at a time when Hanover contends no one had suggested a contrary construction.

The second basis for construction of the will consists of the acts and declarations of Henderson and Charlotte. This subject is further divided into written documents and oral expressions.

The written documents executed by Henderson which have bearing are: (a) the settlement with Amalie, his first wife, (b) the affidavit to the effect that he had no children, (c) his will.

The first document for consideration is the property settlement between Henderson and his first wife, Amalie. [116] This instrument contains only one expression which bears on the point. It is stipulated that Lucy A. H. Deady by will "did give, devise and bequeath to Henderson Brooke Deady the undivided two thirds of Lot numbered one * * * conditioned as in said will provided". It is possible that this expression might relate to the supposed executory devise. But it more probably relates to the words of the will that the devisees of Lot 1 "are upon the express condition that said property shall not be disposed of or encumbered during the period" of twenty-five years. All parties unquestionably accepted the restriction on alienation as valid. Since Henderson could not convey or encumber his in-

terest, the only way in which Amalie could get support was through the payment of money from Henderson directly while he lived, and by a share in the appointed annuity to his widow. In her situation, the freeing of the fee from restrictions at the end of twenty-five years could be of small interest. There are no implications to be drawn from this instrument that Henderson did not have fee simple title, subject to the restriction of alienation.

The affidavit executed by Henderson states that "no child or children have ever been born to me and that I have not had and have not now **any issue** by marriage or otherwise". This is a formal document filed in the estate. It was executed after the decree in the divorce case and after the final settlement with Marye Thompson Deady.

At that date if Henderson had died, Hanover and Matthew Edward would have been his heirs, if Henderson at the time of his death had no **children**, not by virtue of Mrs. Deady's will, but in accordance with the general laws of inheritance. [117] He had no other relatives and he believed he could not alienate his interest. Henderson, **further, was expectant** of death within a short time. This appears as a sufficient and, in fact, the only possible explanation of the document. If the construction of the will had been in issue, the document would have expressed this purpose and have contained apt terms to settle the controversy.

The instrument was intended also to clear Charlotte of the charge made by Hanover and is unquestionably connected with the quarrel mentioned later. Considering the time of execution, it cannot have been intended to convey any implication that Henderson did not have fee simple title.

There is no doubt that Henderson, through loyalty to the wishes of his mother or through belief in the legality of the provisions, bound himself so far as he could to the validity of the distribution of the income by the executors in accordance with the stipulations and in view of the restriction on alienation. He acted as if he had a personal belief that these were binding.

This belief is of interest, in interpreting his own will, the last instrument for consideration on this subdivision. He did appoint an income to Charlotte, as his widow. He believed that with the distribution prescribed by the will or the various stipulations and the restraint on alienation he could not provide for her in any other way. Otherwise, he would not have been so violently disturbed over Hanover's refusal to provide for Charlotte before their marriage.

The failure to devise his interest in Lot 1 to Charlotte expressly in his will, probably has the same explanation. He would expect the others to take advantage of breach of the [118] condition against alienation, especially if Charlotte were involved.

The written documents with which Charlotte was connected are next in order. These consist of: (a) the abortive stipulations and (b) her will.

(a) The first instrument relating to the interest of Charlotte was sent to her by Mr. Wilbur, the attorney for Hanover and Matthew Edward, after Henderson's death. There is dispute over the contents and it need not be further regarded.

The second was signed by Charlotte and Matthew Edward and by Mr. Wilbur, as witness, but not by Hanover and, therefore, did not become effective. This document can be construed in no other way than as a claim of a fee simple interest in the property on behalf of Charlotte with an offer to compromise for a life estate and an assured income. The "controversies" regarding "the nature and extent of their interests and estate in said real property" and the fact that "each has and does assert claims thereto adverse to the claims asserted by the other" are recited. Charlotte offers to deed to Hanover and Matthew Edward "all her right, title and interest in and to Lot numbered one" subject to the legacies "but there is saved, excepted and reserved to said Charlotte Howell Deady, for the term of her natural life, a life estate in an undivided two thirds interest in said real property and its appurtenances and in and to the rents, income and profits therefrom". The document contains also a confirmation of the life estate from the grandsons. This was clearly the assertion of a claim to the title in Char-

lotte. Equally clear is her acceptance [119] of distribution by the executors according to the stipulations and her acceptance of the restriction on alienation.

(b) Her will must be interpreted like that of Henderson. Apparently she, like Henderson, believed that a devise of the interest expressly would be in violation of the condition against alienation.

A thorough consideration of the written documents executed by the parties indicates that all accepted the management of the real property, the distribution of income by the executors and the validity of the restriction on alienation. No express statement in any document is made construing the language of clause seven of the will, notwithstanding the grandsons now urge that Henderson continually adopted the construction for which they now contend.

Next, the testimony of oral expressions by Henderson and Charlotte should be considered. It is extremely doubtful whether this testimony was admissible. In almost every instance the oral testimony was introduced to explain or contradict expressions in the series of written documents which have been considered, including the will. If Henderson accepted the interpretation of clause seven of the will as an executory devise to the grandsons on his death without issue, it would seem that this vital factor would appear in the documents.

It has been urged that Joseph Simon, Chester V. Dolph and Lester W. Humphries and Mary E. Deady are dead and cannot testify as to the representations made by Henderson. But the fact which is more ponderable is that this testimony now under consideration consists of oral declarations claimed to [120] have been made by Henderson, who is dead and cannot explain them.

Neither Henderson nor Charlotte were under any more duty to urge their interpretation of the will than were Hanover and Matthew Edward. Even if the latter were continually urging the proposition that Henderson did not have a fee simple, he and his successors would have a right to rely upon the terms of the will.

The danger and difficulty of re-interpreting written documents upon oral declarations made under various situations over a course of years is apparent.

However, several situations will be considered. The conversations with Weinstein over the settlement with Amalie are in explanation of a written document which is before the court and which does not by its language clearly convey an expression concerning the title. Clear and convincing proof of declarations which divest one of fee simple title must be required. If this was the key of the settlement it would logically appear in the document.

These declarations are furthermore related in general effect and not by specific conversation. How much of this understanding came by Weinstein's

own interpretation, or by vague impressions of someone else who may have read the will and how much was directly said by Henderson himself is problematical. Henderson and his then wife were dealing at arms length. Once she was divorced, Hanover and Matthew Edward would be the heirs of Henderson, unless he already had children and it is probable that the declarations related to this situation, since Hanover made that the point of discussion two months later when the affidavit, which has [121] already been discussed, was obtained. If the inalienability of the property for twenty-five years be assumed, as apparently Henderson assumed it, the settlement was fair and no further circumstantial guaranty of this fact is necessary. Charlotte, after her marriage to Henderson carried out these terms to the letter.

The salient point is that if such admissions were made none were reflected in the written property settlement between Henderson and Amalie.

The alleged declarations of Henderson to Hanover were spread over the period of time from the death of Lucy A. H. Deady on August 29, 1923, to the departure of Henderson for the East, sometime in November, 1925. So far as the testimony is specific as to the conversations, each occurred with reference to a situation which resulted in a document. The first was soon after Lucy A. H. Deady's death. These conversations could not have been as satisfactory to Hanover, since they were followed (1) by the letter of Mr. Wilbur of October 26,

1923, which criticizes the claims of Henderson and advances the interpretation of the will here urged by the grandsons, (2) by the letter of Joseph Simon of October 28, 1923, counselling an amicable arrangement, and (3) by the stipulation of December 18, 1923, which recites that there are controversies, and yields to Henderson a major portion of the income, contrary to the claim of the Wilbur letter that this should be applied to the sinking fund because the grandsons owned the ultimate title.

The declarations to Mary E. Deady are closely connected with the stipulation settling the Marye Thompson Deady claim and can be explained upon the basis that, at that time the [122] grandsons would have got the title in the event of Henderson's death, if he had no children then. The similar explanation of the conversations relating to the affidavit has already been made.

The conversations and quarrel regarding the refusal of Hanover to provide for Charlotte in the event Henderson died before he married her, show Henderson's attitude toward the condition against alienation. He was in fear of immediate death, but he was also afraid to marry Charlotte before the six months had expired, because it might be claimed she was not legally his widow. If he was not married at the time of his death, Hanover and Matthew Edward would have inherited his two-thirds unless he had children. He had sworn he had no children, probably as a preface to an attempt to

get Hanover to agree to provide for Charlotte, in the event he could not marry her before his death.

Charlotte has only one declaration reported and that by hearsay. It was to the effect that Charlotte "knew what Mrs. Deady wanted". These words may mean that Mrs. Deady wanted the estate kept intact and that Charlotte was not going to violate that wish herself. It certainly does not mean that she was advancing no claim to title, as the offer of settlement shows.

Summarizing, none of the written documents contain direct evidence that Henderson was not claiming a fee. The implications are all to the contrary. The oral declarations are vague and indirect and are generally in explanation or contradiction of one of the written documents. Finally, Henderson was under no more duty to place his claim of absolute title into the foreground than were Hanover and Matthew Edward to insist upon their interpretation. [123]

Hanover, moreover, places no reliance upon anything Henderson said or did. The aura of conflict between the two is perfectly apparent in reading the record. Hanover's attitude has been one of hostility to Henderson on account of disapproval of the alleged conduct of the latter. This hostility is untempered by any modifying factors toward Charlotte and plaintiff. It is apparent in the first letter of Mr. Wilbur soon after Mrs. Deady's death, in the refusal to make a compromise regarding support for Charlotte if Henderson died

before marriage, in the desire to cut her annuity as far as possible immediately after Henderson's death. Assuming entire honesty upon his part, it colors his testimony when he says that the stipulation of December 18, 1923, was based altogether upon the controversy relating to the interest of Marye Thompson Deady, when the previous correspondence shows that there was a clash of interest regarding the title between Henderson and himself. This led him also to deny that Charlotte made any claim to title when the document which was before him set up claim of title in her. If this stubborn and uncompromising moral attitude had not existed, he could have settled this dispute by a stroke of the pen. Mr. Wilbur could not have taken the same attitude, since he allowed Matthew Edward to sign the stipulation, put his own name to the document as a witness and thereafter held the document for months, in apparent hope that Hanover would sign it.

This same spirit apparently led Hanover to convince himself that Henderson and everyone else agreed with him on his peculiar interpretation of the will. It is credible that he has constantly believed that the title would come to him if Henderson had no children. But this may be [124] because he would believe no one who suggested a contrary interpretation or doubts as to the construction. In any event, there were many controversies over the income and he did not require Henderson in any

stipulation to specifically state that Hanover and Matthew Edward were to receive the two-thirds of Lot 1 on the former's death, notwithstanding that he yielded to the demands of Henderson for more income many times through the years.

Thus, none of the alleged constructions of the will have weight with the court. The court finds that two-thirds of Lot 1, Block 212, vested in Henderson at the death of his mother, passed to Charlotte and from her to plaintiff.

The next question is as to what relief plaintiff is presently entitled.

The court has heretofore construed the will and thereby found that there was no real testamentary trust since the fee title was vested in the grandsons and Henderson. The executors were simply given the right to collect and distribute the income, pay the specific legacies and create a sinking fund. The power to renew the mortgage is given to the fee owners and the restriction against alienation is placed directly against them, not against the executors.

The question of subsequent construction does affect this clause of the will. Joseph Simon and Henderson did not close the estate and claimed only to act as "executors". Joseph Simon did not close the estate after Henderson's death nor during the remaining period of his own life and claimed to be acting as surviving executor. In each of the stipulations Joseph Simon and Henderson are described

as "executors". They never pretend to act as trustees. In [125] each stipulation a complete validation of the previous acts and payments made by the "executors" is required. These circumstances clearly indicate a serious doubt as to the validity of the clauses of the will, which it now is contended create a trust.

When The First National Bank closed the estate as executors, it was not, therefore, vested with any rights as a trustee, under the will or otherwise. The land was charged with the payment of specific sums of money and these would have to be paid by the holders of the fee, insofar as valid.

There was, however, a trust created by the stipulation of October 28, 1925, Joseph Simon and Henderson received the real property during the life of Marye Thompson Deady with the duty to pay the specified sums and to create a sinking fund. Since plaintiff is not therein mentioned he cannot be considered as entitled to share in any present income from the property. However, he is presently entitled to an accounting from the trustee who may be appointed to succeed the original trustee under this stipulation. The First National Bank is not a successor, but wrongfully exercises control over the estate. But by virtue of its possession, it holds the property subject to the obligations of a trustee by virtue of its own wrongful seizure. Plaintiff is then entitled to an accounting as against the bank.

Findings and judgment will enter in accordance with this opinion.

[Endorsed]: Filed November 17, 1941. G. H. Marsh, Clerk. By R. DeMott, Deputy. [126]

And afterwards, to wit, on Tuesday, the 24th day of February, 1942, the same being the 42nd Judicial day of the Regular November, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [127]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit came on regularly for trial before the Honorable James Alger Fee, Judge presiding, plaintiff appeared by Robert F. Maguire and Donald K. Grant of his attorneys; defendant First National Bank of Portland appeared by Edgar Freed and Nicholas Jaureguay of its attorneys, and defendants Matthew Edward Deady and Hanover Deady appeared personally and by said last named attorneys. Whereupon evidence was adduced by the respective parties, the parties rested, and the case was submitted to the court; and the court being advised in the premises makes the following:

Findings of Fact

I.

That plaintiff is a citizen and resident of the State of Connecticut and is one and the same person as Richard Howell Busck, a son of Charlotte Howell Deady, who is named in the last will and testament of the said Charlotte Howell Deady as her sole legatee and devisee, all of which more fully appears from the last will and testament of the said Charlotte Howell Deady hereinafter set out.

II.

That the defendants, Matthew Edward Deady and Hanover Deady, are citizens and residents of the State of Oregon.

III.

That the defendant, the First National Bank of Portland, [128] is a national banking association organized and existing under the national banking laws of the United States of America with its office and principal place of business in the City of Portland, State of Oregon.

IV.

That the controversy herein involves money and property rights exclusive of interest and costs of a value in excess of \$3,000.00.

V.

That on and before the 29th day of August, 1923, the said Lucy A. H. Deady was seized in fee

of the following described real property located and situated in the City of Portland, County of Multnomah, State of Oregon, towit:

Lot One (1), Block Two Hundred and Twelve (212) City of Portland, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That on or about said date said Lucy A. H. Deady died leaving a last will and testament which was duly and regularly proved and admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, on the 5th day of September, 1923; that letters testamentary issued out of said court on the 15th of September, 1923, to Joseph Simon and Henderson Brooke Deady, as executors of the last will and testament of said Lucy A. H. Deady, deceased; administration of the estate of said deceased was had thereunder and said estate was closed and the then executor thereof, to-wit, The First National Bank of Portland, was discharged on March 16, 1936. Said last will and testament was in words and figures substantially as follows:

In The Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid. [129]

Second: I request and direct that my body be interred by the side of my late husband, Mathew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment of each of my grandsons,—Matthew Edward Deady and Hanover

Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00, nor more than \$2500.00, per year in discretion of my executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1, Block numbered 212,

Sixth: I will and direct that said Lot numbered One (1) in Block numbered two hundred and twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees, except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said

property shall not be disposed of or encumbered during the period aforesaid, provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot [130] numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1, Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds

to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady: to Henderson Brooke Deady the undivided two thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees named herein, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made.

In witness whereof, I have hereunto set my hand and [131] seal this 29th day of July, A. D. 1920, at Portland, Oregon.

(Signed) LUCY A. H. DEADY (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) CHESTER V. DOLPH

Residing at Portland, Or.

(Signed) J. V. BEACH

Residing at Portland, Or.

VI.

That the said Henderson Brooke Deady died without issue on or about the 28th day of May, 1933, leaving a last will and testament wherein and whereby he devised and bequeathed all of his property, real and personal, to his wife, Charlotte Howell Deady; that said last will and testament was, on the 18th day of July, 1933, duly and regularly proved and admitted to probate in the Circuit Court of Multnomah County, State of Oregon, Department of Probate, and administration of said estate commenced thereunder by letters dated July 8, 1933, appointing Robert H. Strong as executor thereof, who thereafter and on the 18th day of July, 1933, duly qualified and became and ever since said date has been and now is such executor. Said last Will and Testament of Henderson Brooke Deady was in words and figures substantially as follows:

I, Henderson Brooke Deady, of the City of Portland, State of Oregon, being of sound and disposing mind and memory, do make, publish and declare the following to be my Last Will and Testament, hereby revoking all other and former wills by me at any time made.

First: I nominate and appoint Robert H. Strong of the City of Portland, State of Oregon, sole executor of this, my Last Will and Testament, and direct that no bond of any sort shall be required of him.

Second: I give, devise and bequeath unto my beloved wife, Charlotte Howell Deady, all my property, real and personal, of every name, nature and kind, wheresoever the same may be situated.

Third: Under Paragraph 8 of the Last Will and Testament of my beloved mother, Lucy A. H. Deady, executed the 29th day of July, 1920, I am authorized and permitted to bequeath by my last Will and Testament to my wife, the income which would be derived by me, if living, from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during [132] the term of her natural life. I now, under and by virtue of said paragraph 8 of my said beloved mother's will, bequeath said income from said two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, to my beloved wife, Charlotte Howell Deady, for and during the term of her natural life, and nominate and constitute her my appointee under said paragraph 8 of the said will of Lucy A. H. Deady.

In witness whereof, I have hereunto set my hand and seal this 22nd day of October, 1932.

HENDERSON BROOKE DEADY (Seal)

The above and foregoing was duly signed, sealed, published and declared by the said Henderson Brooke Deady to be his Last Will and Testament, in our presence, and we and each of

us in his presence and in the presence of each other and at his request signed our names as witnesses thereto on the date therein named and the said Henderson Brooke Deady was at said time, in our opinion, of sound and disposing mind and memory and free from restraint of any sort.

Names	Addresses
RALPH C. DODD	New Milford, Conn.
JOHN S. ADDIS	New Milford, Conn.

VII.

That the said Charlotte Howell Deady died on or about the 12th day of July, 1935, leaving a last will and testament; that on the 22nd day of July, 1935, said last will and testament of the said Charlotte Howell Deady was duly and regularly proved and admitted to probate in the State of Connecticut and that on said date the plaintiff herein was appointed and qualified as and ever since said date has been and now is executor of the last will and testament of the said Charlotte Howell Deady. The last Will and Testament of Charlotte Howell Deady was in words and figures substantially as follows:

I, Charlotte Howell Deady, of New Milford, Connecticut, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other and former wills by me made.

First: I do hereby order and direct that all of my just debts and funeral expenses be paid

out of my estate as soon after my decease as possible.

Second: I give, devise and bequeath unto my beloved husband, Dr. Henderson Brooke Deady, all my estate, real, personal and mixed, where-soever situated, absolutely and forever. [133]

Third: If my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I give, devise and bequeath unto my son, Richard Howell Busck, also known as Richard Howell, my farm in New Milford, Connecticut, consisting of house, barn and approximately sixty acres (60) of land, and all the contents and furnishings of said house and machinery and apparatus and stock and poultry on said farm.

Fourth: In case my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I further give, devise and bequeath unto my beloved son, Richard Howell Busck, also known as Richard Howell, all my other property, real, personal and mixed, wheresoever situated and of any kind or nature whatsoever, including all money which I may have in any bank or banks at the time of my decease, also all notes, bonds, and stocks, and bonds and mortgages owned by me at the time of my decease, and all debts which may be owing to me at said time.

Fifth: I make no provision for my daughter, Karen Busck, in this, my Last Will and Testa-

ment, because she has arrived at her majority and has received her education and is self supporting.

Sixth: I nominate, constitute and appoint Dr. Henderson Brooke Deady to be executor of this, my Last Will and Testament; if my said beloved husband, Dr. Henderson Brooke Deady, should predecease me, I nominate, constitute and appoint my beloved son, Richard Howell Busck, also known as Richard Howell, to be executor of my Last Will and Testament, and direct that no bond or other security be required of either of them for the faithful performance of their duties.

In witness whereof I have hereunto set my hand and seal this fourth day of May, in the year One Thousand Nine Hundred and Thirty-three.

CHARLOTTE HOWELL DEADY (Seal)

Witnessed by:

JOHN M. SCOBLE

MARIVA INGLING

N. COURTENAY JOHNSTON

The foregoing instrument was subscribed, sealed, published and declared by Charlotte Howell Deady, the testatrix above named, as and for her Last Will and Testament, in the presence of each of us, who, at her request, in her presence and in the presence of each other,

have hereunto subscribed our names as witnesses the day and year above written.

MARIVA INGLING

residing at 259 Edward St.

Ridgewood, N. J.

K. COURTENAY JOHNSTON

residing at 461 West 22 Street

City of New York

JOHN M. SCOBLE

residing at 988 Lincoln Place

Brooklyn, N. Y.

VIII.

That there exists between the plaintiff and defendants [134] herein an actual bona fide and justiciable controversy within the meaning of the provisions of Title 28 U.S.C.A., Sec. 400, which said controversy involves in part the construction and legal interpretation of the said last will and testament of the said Lucy A. H. Deady and depends for its determination upon a judicial declaration of the legal rights of this plaintiff thereunder.

IX.

That Charlotte Howell Deady during her lifetime made no conveyance of any title to said real property or any interest therein.

X.

That the clear intention of Lucy A. H. Deady, deceased, (hereinafter referred to as the testatrix)

was by her will to devise an undivided two-thirds ($\frac{2}{3}$) of Lot numbered one (1) in Block numbered Two Hundred Twelve (212) of the City of Portland, Oregon, (hereinafter referred to as "said property"), to her son Henderson Brooke Deady in fee simple, and to devise an undivided one-third of said property by like title to her two grandsons, Hanover Deady and Matthew Edward Deady.

XI.

That the clear intention of Lucy A. H. Deady was by her will to subject said two devises to like conditions, provisions and charges by which the testatrix attempted to control the disposition of the income from the whole property and to prevent its alienation or encumbrance for a period of at least 25 years from her death.

XII.

That the testatrix intended by paragraph Seventh of her will to substitute Hanover Deady and Matthew Edward Deady for Henderson Brooke Deady as devisees of said two-thirds ($\frac{2}{3}$) interest in fee in said property in the event of the death of Henderson Brooke [135] Deady during her lifetime without children, but this paragraph of the will was not intended by the testatrix to defeat, cut down or limit the fee given to Henderson Brooke Deady if he outlived her.

XIII.

That upon the death of Henderson Brooke Deady, his full estate in fee simple in two-thirds of said

property passed by testamentary devise to his widow, Charlotte Howell Deady, and upon her death all her full estate in fee in said undivided two-thirds of said property passed by testamentary devise to plaintiff.

XIV.

That at all times since the death of Charlotte Howell Deady plaintiff has retained full interest in and ownership of said undivided two-thirds ($\frac{2}{3}$) of Lot 1, Block 212, City of Portland, Oregon.

XV.

That neither plaintiff or his predecessors in interest ever agreed to any other or different construction of the will of Lucy A. H. Deady.

XVI.

Neither Henderson Brooke Deady or Charlotte Howell Deady, or plaintiff, have at any time construed the will of Lucy A. H. Deady to mean that Henderson Brooke Deady, upon the death of Lucy A. H. Deady, received only a defeasible fee in Lot One (1), Block Two Hundred Twelve (212) City of Portland, subject to be defeated by his death without issue.

XVII.

That Henderson Brooke Deady did not at any time represent to the defendants Hanover Deady or Matthew Deady that Lucy A. H. Deady by her said will intended to give the said Henderson Brooke

Deady only a defeasible fee in said real property which would be defeated in favor of Hanover Deady and Matthew Deady upon Henderson [136] Brooke Deady's death without issue, or that he, the said Henderson Brooke Deady, under said will received such a defeasible fee in said property or that upon his death without issue his interest in the property would go to them subject to the power of appointment in favor of his wife, given in said will; nor did Hanover Deady or Matthew Deady act on any such representations to Henderson Brooke Deady's benefit or their detriment.

XXIII.

That Henderson Brooke Deady did not at any time acquiesce in the interpretation of the will of Lucy A. H. Deady that he received only a defeasible fee in said property, nor did he elect to accept said interest, nor did he waive any other interest therein.

XIX.

That the executors of the estate of Henderson Brooke Deady did not accept or acquiesce in the interpretation of the will of Lucy A. H. Deady that Henderson Brooke Deady was devised only a defeasible fee in said property.

XX.

That plaintiff and his predecessors in interest have not been guilty of laches or undue delay in bringing this suit or in making a claim to be the

owners of an absolute fee simple estate in an undivided two-thirds ($\frac{2}{3}$) interest in said real property.

XXI.

That as early as October 26, 1923, Henderson Brooke Deady asserted that he was the owner of an absolute fee simple estate in an undivided two-thirds ($\frac{2}{3}$) interest in said property and the defendants Hanover Deady and Matthew Deady contended that he received only a defeasible fee that would be defeated upon his death without issue.

XXII.

That there has been no waiver by plaintiff or his predecessors in interest of any right to or interest in said property. [137]

That at no time did plaintiff or his predecessors in interest make any election to accept any lesser interest in said property than the undivided two-thirds ($\frac{2}{3}$) in fee simple to which they were entitled.

XXIII.

That Lucy A. H. Deady did not by her will intend to create nor provide for the creation of a trust after the probate of her estate should be completed, the estate closed and her executors discharged.

XXIV.

That on or about the 28th day of October, 1925, Henderson Brooke Deady, Matthew Edward Deady, Hanover Deady, Marye T. Deady and Mary E.

Deady entered into a contract which has been received in evidence as Exhibit E, and which contract is in words and figures substantially as follows:

Whereas Marye T. Deady has filed suit in the Circuit Court of the State of Oregon for Multnomah County against Henderson Brooke Deady, Mary E. Deady, Matthew Deady, Hanover Deady and Henderson Brooke Deady and Joseph Simon as executors of the estate of Lucy A. H. Deady, deceased, being Case No. K 8897, for the relief claimed in said suit, among other things for an undivided one-third interest in Lot one, Block two hundred twelve, in the City of Portland, County of Multnomah, State of Oregon, and

Whereas the undersigned, being all the beneficiaries and legatees under the will of Lucy A. H. Deady of said property, and being all of the persons interested in said property and in the income therefrom, have compromised and settled the controversies created by said suit, whereby said suit is to be dismissed without costs and with prejudice, now therefore

In consideration of the Premises, and of said settlement and dismissal of said suit, and of the execution of this agreement, it is agreed by the undersigned that from the income derived from said Lot 1, Block 212, there shall be paid to Marye T. Deady (she being the same person named as Marye Thompson Deady in the will of Lucy A. H. Deady) during the term

of her natural life and beginning November 1, 1925, the sum of One Hundred Fifty Dollars (\$150) per month, payable monthly. Such monthly payment shall supersede and be in lieu of the monthly payment of \$75.00 provided for said Marye T. Deady in said will of Lucy A. H. Deady. All other payments of income provided for in said will shall remain as specified in said will, except that Henderson Brooke Deady shall continue to be paid four hundred dollars per month, or such other sum per month [138] during the administration of the estate of said Lucy A. H. Deady in the discretion of the executors as they may deem proper and until he shall become entitled to the full distribution provided for in said will, and the stipulation and agreement made by the parties October , 1924, is hereby rescinded and cancelled; but the payments of \$150 per month each to Marye T. Deady and to Mary E. Deady shall have priority over other payments of said income.

And the undersigned hereby expressly authorize and direct said executors and the trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to make the monthly payment of income to Marye T. Deady hereinbefore agreed to without other or further authority, direction or order from any person or any court; and the undersigned hereby authorize and direct the said executors and the

trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to defer the creation of a sinking fund under paragraph Fifth of the will of Lucy A. H. Deady, deceased, until after the death of either Marye T. Deady, Mary E. Deady or Henderson Brooke Deady, and upon the death of any one of said three persons named, the sinking fund provision of said will shall be effective; and the undersigned for themselves, their heirs, administrators, successors and assigns and for all persons claiming by, through or under them, or any of them, hereby expressly waive and release all claims of any and every nature whatsoever which they or any of them might have or assert against any executor, trustee or trustees, manager or managers, their heirs, administrators, successors or assigns, by reason of such monthly payments of income to Marye T. Deady, or by reason of deferring the creation of such sinking fund, or by reason of anything resulting from or attributable to such monthly payments of income to Marye T. Deady, or the deferring of such sinking fund.

It is agreed that said Marye T. Deady shall make, execute and deliver to Henderson Brooke Deady, Matthew Deady, and Hanover Deady, in proportion to their interests in said Lot 1, Block 212, City of Portland, Oregon, under said will of Lucy A. H. Deady, deceased, a

special warranty deed to said lot 1, Block 212, City of Portland, Oregon, said deed shall be subject to the terms of this agreement, and to the payment of said \$150.00 per month to said Marye T. Deady during the remainder of her life. And said lot shall be impressed with and be held in trust and remain in the possession of the trustees and the income from said property shall be collected and distributed by the trustees and said property shall be and remain charged with the payment of said \$150.00 per month to said Marye T. Deady during the remainder of her natural life.

In witness whereof, the parties have hereunto set their hands and seals this 28th day of October, 1925.

Witnessed.

L. W. Humphreys)

Chester V. Dolph) as to

(Henderson Brooke Deady (Seal)

(Matthew Edward Deady (Seal)

(Hanover Deady

John S. Coke) as to signature

Mae Connors) of Marye T. Deady

Marye T. Deady (Seal)

Mary E. Deady (Seal)

[139]

Accepted.

Henderson Brooke Deady

Joseph Simon

Executors

XXV.

That by the terms of said agreement dated October 28, 1925, the parties thereto intended to and did impose a trust and charge upon said property and the income therefrom in favor of Marye T. Deady for and in the amount of \$150.00 per month during the remainder of her natural life.

XXVI.

That by the terms of the agreement set forth in Finding No. XXIV, the parties intended to and did provide that, subject to the charge of \$150.00 per month to Marye T. Deady, for the remainder of her natural life, the other payments of income provided for in the will of Lucy A. H. Deady should remain as in said will specified, except that Henderson Brooke Deady should continue to be paid and receive \$400.00 per month, or such other sum, during the administration of the estate of Lucy A. H. Deady as the executors deemed proper, until such time as said Henderson Deady became entitled to the full distribution as provided for in said will.

Based upon the foregoing findings of fact, the court makes the following

Conclusions of Law

1. That upon the death of Lucy A. H. Deady, Henderson Brooke Deady became vested with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject to certain charges and encumbrances,

not subject to be defeated by his death thereafter without issue.

2. That on the death of Henderson Brooke Deady, Charlotte Howell Deady, as heir at law of Henderson Brooke Deady, and by devise from him, became vested with fee simple title to an undivided two-thirds [140] ($\frac{2}{3}$) interest in Lot 1, Block 212, City of Portland, Oregon.

3. That on the death of Charlotte Howell Deady, and at all times since her death, to-wit, July 12, 1935, by devise from said Charlotte Howell Deady to plaintiff, plaintiff is now and at all times has been vested with fee simple title to an undivided two-thirds ($\frac{2}{3}$) interest in Lot 1, Block 212, City of Portland, Oregon.

4. That the language used in paragraph Seventh of the Will is of doubtful import and does not evidence any intention on the part of Lucy A. H. Deady to cut down the fee previously given in paragraph Seventh to Henderson Brooke Deady if he survived her; and that Lucy A. H. Deady intended by said Seventh paragraph of her Will to substitute Matthew Edward Deady and Hanover Deady for Henderson Brooke Deady in the event he died without issue and she outlived him.

5. That plaintiff is not entitled to receive any of the income from Lot 1, Block 212, City of Portland, Oregon, accruing prior to the death of Marye T. Deady, but shall, thereafter be entitled to all the rights of owner of an undivided two-thirds ($\frac{2}{3}$) interest in fee simple in said property.

6. That the last portion of paragraph Fifth of said Will providing for the creation of a sinking fund is null, void and of no effect.

7. That all of paragraph Sixth of said Will is null, void and of no effect, except the proviso for the renewal of the present mortgage.

8. That this suit is not a will contest and is not barred by any statute of limitations nor has plaintiff been guilty of any laches.

9. That the plaintiff is the real party in interest and the only necessary party plaintiff to this suit.

10. That neither plaintiff nor his predecessors in interest are estopped from asserting that he is and they were the owners in fee simple absolute of an undivided two-thirds ($\frac{2}{3}$) interest in [141] Lot 1, Block 212, City of Portland, subject only to the charges against said property and the income therefrom in favor of Mary E. Deady, and as provided for in the will of Lucy A. H. Deady, and the further charge upon and trust created in said property in favor of Marye Thompson Deady by the agreement of October 28, 1925, set forth in Findings of Fact No. XXIV.

11. The defendant First National Bank is not vested with any rights as trustee under the will of Lucy A. H. Deady or otherwise, to said real property or the rents, income or profits thereof, and by virtue of its possession of said real property, and its receipt of the income, rents and profits thereof, is bound to make accounting therefor to plaintiff, from July 12, 1935.

12. That the defendants Hanover Deady and Matthew Deady are bound to make accounting for any rents, income and profits of any amounts received by them since July 12, 1935, which are in excess of one-third ($\frac{1}{3}$) of the net rents, income and profits of said property.

13. That decree be entered in this court in accord with these Findings of Fact and Conclusions of Law.

Done and dated this 24th day of February, 1942.
(sgd) JAMES ALGER FEE

[Endorsed]: Filed February 24, 1942. G. H. Marsh, Clerk. By R. DeMott, Deputy. [142]

And afterwards, to wit, on Tuesday, the 24th day of February, 1942, the same being the 96th Judicial day of the Regular November, 1941, Term of said Court: present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:
[143]

In the District Court of the United States
for the District of Oregon

No. E-9641

RICHARD HOWELL,

Plaintiff,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Defendants.

DECREE

The court having heretofore made its Findings of Fact and Conclusions of Law herein, it is hereby Ordered, adjudged, decreed and declared:

I.

That by the will of Lucy A. H. Deady, deceased, Henderson Brooke Deady, her son, became vested on her death with an undivided two-thirds interest in said Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject only to a charge against the income from said property in favor of Mary E. Deady in the amount of \$150 per month during the term of her natural life and a charge against the property and income therefrom in favor of Marye Thompson Deady in the sum of \$75.00 per month for the term of her natural life so long as she remains unmarried.

II.

That by the will of Henderson Brooke Deady, his widow, Charlotte Howell Deady, became vested on the death of the said Henderson Brooke Deady with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject only to the charges set forth in paragraph numbered one of this decree.

III.

That by the will of Charlotte Howell Deady, her son, Richard Howell, the plaintiff herein, became vested on her death with [144] title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject only to the charges set forth in paragraph numbered one of this decree.

IV.

That it was not the intention of Lucy A. H. Deady by Paragraph Seventh of her will to cut down the fee previously given, devised and bequeathed to Henderson Brooke Deady by Paragraph Third of said will if he survived her; it was her intention to substitute Matthew Edward Deady and Hanover Deady for Henderson Brooke Deady in the event that Henderson Brooke Deady died without issue and she, the said Lucy A. H. Deady, survived him.

V.

That the provision in Paragraph Fifth of the will of Lucy A. Deady creating a sinking fund

for the purpose of retiring and paying off a mortgage then existing on said real property is null, void and of no effect.

VI.

That Paragraph Sixth of said will of Lucy A. H. Deady attempting to prohibit the devisees under said will from mortgaging, partitioning, selling or otherwise encumbering said property for a period of 25 years after her death is null, void and of no effect.

VII.

That the will of Lucy A. H. Deady created no trust and the defendant, The First National Bank of Portland, Oregon, is not a trustee under said will nor is it a trustee under the agreement of October 28, 1925, between Marye Thompson Deady, Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady and Mary E. Deady.

VIII.

That said agreement of October 28, 1925, last mentioned, created a trust on Lot 1, Block 212, City of Portland, Oregon, and on the income arising from said real property, to secure the payment of the sum of \$150 per month in favor of Marye Thompson Deady for the [145] term of her natural life.

IX.

That there is now no trustee to administer said trust.

X.

The defendant, The First National Bank of Portland, Oregon, since July 12, 1935, has wrongfully exercised control and possession over Lot 1, Block 212, City of Portland, Oregon, and has without lawful right held, possessed, operated, managed and collected income therefrom and made disbursements therefrom, and has held said property and the rents, income and profits thereof since July 12, 1935, by reason of its own wrongful seizure and possession of the same. And it is hereby ordered and adjudged to make an accounting as to said real property and said rents, income and profits to plaintiff and defendants Hanover Deady and Matthew Edward Deady.

XI.

That the plaintiff, Richard Howell, is not entitled to receive any of the income from said property accruing prior to the death of Marye Thompson Deady but shall thereafter be entitled to all the rights of an owner of an undivided two-thirds ($2/3$) interest in fee simple of said real property.

XII.

That the defendants Hanover Deady and Matthew Edward Deady are hereby ordered, adjudged and decreed to make an accounting for all sums received by them or either of them in excess of one-third ($1/3$) of the net income, rents and profits of said property after the payment of the charges and legacies of Mary E. Deady and Marye Thomp-

son Deady hereinbefore referred to since July 12, 1935.

XIII.

The defendant, The First National Bank of Portland, Oregon, Hanover Deady and Matthew Edward Deady shall, within 90 days from the date of this decree, file their respective accounts herein, showing all monies received from and all disbursements made out of the income, [146] rents, profits, use and operation of said property since July 12, 1935.

XIV.

This court retains jurisdiction of this suit for the purpose of hearing and determining said accounting and to make any and all necessary and appropriate orders and decrees in relation thereto for the enforcement hereof and further retains jurisdiction of this suit to make such further orders and decrees and to grant such further relief as may be equitable and proper in the execution and enforcement of this decree.

XV.

That plaintiff have and recover of defendants his costs and disbursements herein incurred, taxed at \$.....

Done in open court this 24th day of February, 1942.

/sgd/ JAMES ALGER FEE
Judge

[Endorsed]: Filed February 24, 1942. G. H. Marsh, Clerk, By R. DeMott, Deputy. [147]

And afterwards, to wit, on the 9th day of April, 1942, there was duly filed in said Court, a Notice of Appeal, in words and figures as follows, to wit:

[148]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this case on the 24th day of February, 1942, and from the whole thereof.

Dated this 8th day of April, 1942.

SIMON, GEARIN, HUMPHREYS &
FREED

EDGAR FREED

NICHOLAS JAUREGUY

Attorneys for the Appellants, Mat-
thew Edward Deady, Hanover
Deady and The First National
Bank of Portland.

Address of Attorneys,
1111 Failing Building
Portland, Oregon

[Endorsed]: Filed April 9, 1942, G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [149]

And afterwards, to wit, on the 9th day of April, 1942, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[150]

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents, that we, Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), a national banking association, as principals, and Glens Falls Indemnity Company, a corporation of the State of New York authorized to become surety upon appeal bonds, as surety, are held and firmly bound unto Richard Howell, plaintiff in the above-entitled case, his heirs, executors, administrators and assigns, in the sum of Two Hundred Fifty (\$250.00) Dollars; for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is such that,

Whereas, said Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), defendants in the above-entitled case, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered against them and in favor of said Richard Howell, plaintiff in the above-entitled case, on the 24th day of February, 1942;

Now therefore, if said appellants shall prosecute said appeal to effect; or if they shall pay all costs, in the event said appeal is dismissed or said decree is affirmed; or if they shall pay such costs as the appellate Court may award, in the event said decree is modified; then the above obligation shall be void; otherwise it shall remain in full force and effect. [151]

In witness whereof, Matthew Edward Deady and Hanover Deady have executed these presents; The First National Bank of Portland has caused these presents to be executed by its duly authorized officer; and Glens Falls Indemnity Company has caused these presents to be executed by its duly authorized attorney-in-fact this 8th day of April, 1942.

MATTHEW EDWARD DEADY
HANOVER DEADY
THE FIRST NATIONAL BANK
OF PORTLAND, (Oregon)

By E. B. MacNAUGHTON
President

(Seal)

GLENS FALLS INDEMNITY
COMPANY

By GEO. B. RODGERS
Attorney

[Endorsed]: Filed April 9, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [152]

And afterwards, to wit, on the 13th day of April, 1942, there was duly filed in said Court, a Designation of Contents of Record on Appeal, in words and figures as follows, to wit: [153]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, defendants above named, and the appellants in the appeal of the above-entitled case to the United States Circuit Court for the Ninth Circuit, hereby designate the following for inclusion in the Record on Appeal:

The Complete record, proceedings and evidence in said case, omitting therefrom (except in the case of the Complaint, the Decree, the Notice of Appeal, the Bond on Appeal and the Supersedeas Bond) the formal parts thereof. This shall include—

Amended Complaint

Motion to Dismiss Amended Complaint

Objections to the Application of the Rules of
Civil Procedure

Order Suspending Application of Rules of
Civil Procedure

Court's Opinion on Motion to Dismiss

Order Denying Motion to Dismiss

Answer

Pretrial Order

Transcript of Testimony

All Exhibits

Court's memorandum on Admission of Evidence

Court's Opinion

Findings of Fact and Conclusions of Law

Decree

Notice of Appeal

Bond on Appeal

Supersedeas Bond

Designation of Contents of Record on Appeal

SIMON, GEARIN, HUMPHREYS &
FREED

EDGAR FREED

NICHOLAS JAUREGUY

Attorneys for the Appellants, Matthew Edward Deady, Hanover Deady and The First National Bank of Portland. [154]

Service of the within Designation of Contents of Record on Appeal is hereby accepted in Multnomah County, State of Oregon this 13th day of April, 1942, by receiving a copy thereof, duly certified to

as such by Edgar Freed of Attorneys for Defendants and Appellants.

MAGUIRE, SHIELDS, MORRISON &
BIGGS.

Of Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed April 13, 1942. G. H. Marsh, Clerk, By F. L. Buck, Chief Deputy. [155]

And afterwards, to wit, on the 20th day of April, 1942, there was duly filed in said Court, a Supersedeas Bond on Appeal in words and figures as follows, to wit: [156]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know all men by these presents, that we, Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), a national banking association, as principals, and Glens Falls Indemnity Company, a corporation of the State of New York authorized to become surety upon appeal bonds, as surety, are held and firmly bound unto Richard Howell, plaintiff in the above-entitled case, his heirs, executors, administrators and assigns, in the sum of One Thousand (\$1,000.00) Dollars; for the payment of which we bind our-

selves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is such that,

Whereas, said Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), defendants in the above-entitled case, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered against them and in favor of said Richard Howell, plaintiff in the above-entitled case, on the 24th day of February, 1942;

Now therefore, if said appellants shall prosecute said appeal to effect; or if they shall satisfy the decree in full, together with costs, interest and damages for delay, in the event the appeal is dismissed or said decree is affirmed; or if they shall satisfy in full such modification of the decree and such costs, interest and damages as the appellate court may adjudge and award, in the event said decree is modified; then the above obligation shall [157] be void; otherwise it shall remain in full force and effect.

In witness whereof, Matthew Edward Deady and Hanover Deady have executed these presents; The First National Bank of Portland has caused these presents to be executed by its duly authorized officer; and Glens Falls Indemnity Company has caused these presents to be executed by its duly

authorized attorney-in-fact this 13th day of April, 1942.

MATTHEW EDWARD DEADY
HANOVER DEADY
THE FIRST NATIONAL BANK
OF PORTLAND, (Oregon)

By E. B. MacNAUGHTON
President

GLENS FALLS INDEMNITY
COMPANY

By GEO. B. RODGERS
Attorney

Approved:

JAMES ALGER FEE,
Judge

[Endorsed]: Filed April 20, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [158]

And afterwards, to wit, on Monday, the 4th day of May, 1942, the same being the 55th judicial day of the regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[159]

[Title of District Court and Cause.]

ORDER TO SEND ORIGINAL EXHIBITS TO
APPELLATE COURT

It is ordered that the Clerk of this Court send to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the Record on Appeal in this case, the original exhibits in this case instead of copies thereof.

JAMES ALGER FEE

Judge

Consented to.

MAGUIRE, SHIELDS, MORRISON & BIGGS
R. S. KESTER

Of Attorneys for Plaintiff

[Endorsed]: Filed May 4, 1942. G. H. Marsh,
Clerk. By R. DeMott, Deputy Clerk. [160]

And afterwards, to wit, on the 12th day of May, 1942, there was duly filed in said Court, a Notice of Cross-Appeal, in words and figures as follows, to wit: [161]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Richard Howell, plaintiff above named, and appellee herein, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the decree

entered herein by the District Court of the United States for the District of Oregon on or about the 24th day of February, 1942, which provided as follows:

“XI.

“That the plaintiff, Richard Howell, is not entitled to receive any of the income from said property accruing prior to the death of Marye Thompson Deady but shall thereafter be entitled to all the rights of an owner of an undivided two-thirds ($2/3$) interest in fee simple in said real property.”

Dated at Portland, Oregon, this 12 day of May, 1942.

MAGUIRE, SHIELDS, MORRISON &
BIGGS

Of Attorneys for Richard Howell,
Plaintiff, Appellee and Cross-Appellant.

MAGUIRE, SHIELDS, MORRISON & BIGGS,
Attorneys for Richard Howell,
723 Pittock Block,
Portland, Oregon.

[Endorsed]: Filed May 12, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [162]

And afterwards, to wit, on the 12th day of May, 1942, there was duly filed in said Court, a Bond for Costs on Cross-Appeal in words and figures as follows, to wit: [163]

[Title of District Court and Cause.]

COST BOND ON CROSS-APPEAL

Know all men by these presents, that we, Richard Howell, as principal, and United States Fidelity & Guaranty Company, a corporation of the State of Maryland, qualified to do and transact a general surety business within the State of Oregon, as surety, are held and firmly bound unto Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, in the full and just sum of Two Hundred Fifty and no/100 (\$250) Dollars to be paid to the said obligees, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally; by these presents.

Sealed with our seals and dated this 12th day of May, 1942.

Whereas, in the District Court of the United States for the District of Oregon, in a cause pending in said court between Richard Howell, plaintiff, and Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, defendants, a decree was rendered against the said defendants and in part against the said plaintiff, and the said defendants having filed in said court a notice of appeal to reverse said decree, and the said plaintiff having filed in said court a notice of cross-appeal to [164] re-

verse that portion of said decree which was adverse to said plaintiff, and said appeal and -cross-appeal are now pending in the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Circuit Court of Appeals to be holden at San Francisco in the State of California;

Now the condition of the above obligation is such that if the said plaintiff and cross-appellant shall prosecute said cross-appeal to effect, and satisfy such order for payment of costs as may be made if for any reason said cross-appeal is dismissed or if the portion of the decree so appealed from is affirmed, then the above obligation to be void, otherwise to remain in full force and effect.

Dated this 12th day of May, 1942.

RICHARD HOWELL,

Principal

By MAGUIRE, SHIELDS, MORRISON &
BIGGS

His Attorneys

UNITED STATES FIDELITY &
GUARANTY COMPANY,

Surety

By RAYMOND C. WEIN (Seal)

Attorney-in-Fact

Countersigned:

J. C. CORBIN CO.

Agent

[Endorsed]: Filed May 12, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [165]

And afterwards, to wit, on the 12th day of May, 1942, there was duly filed in said Court, Cross-Appellant's Designation of Contents of Record on Appeal, in words and figures as follows, to wit:

[166]

[Title of District Court and Cause.]

CROSS-APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD.

Notice is hereby given that Richard Howell, plaintiff above named, and appellee and cross-appellant herein hereby designates for inclusion in the record on appeal herein the complete record and all the proceedings and evidence in this cause, as heretofore designated by the defendants, appellants and cross-appellees herein, and as heretofore compiled and certified by the clerk of this court under date of May 6, 1942, with the following additions thereto:

Notice of Cross-Appeal

Cost Bond on Cross-Appeal

Cross-Appellant's Designation of Contents of
Record (This designation).

Dated at Portland, Oregon, this 12 day of May,
1942.

MAGUIRE, SHIELDS, MORRISON &
BIGGS

Of Attorneys for Cross-Appellant
MAGUIRE, SHIELDS, MORRISON &
BIGGS,

Attorneys for Cross-Appellant,
723 Pittock Block,
Portland, Oregon.

[Endorsed]: Filed May 12, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [167]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 167 inclusive, constitute the transcript of record on appeal from a decree of said Court in a cause therein numbered E-9641, in which Richard Howell is plaintiff, appellee, and cross-appellant, and Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association are defendants, appellants, and cross-appellees; that said transcript has been prepared by me in accordance with the designations of contents of the record on appeal filed therein by

appellants and cross-appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designations.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$26.55 for comparing and certifying the within transcript, making a total of \$31.55, and that the same has been paid by said appellants; and \$5.00 for filing Notice of Cross-Appellant and ninety cents for comparing and certifying transcript required by the designation of the cross-appellant, making a total of \$5.90, which has been paid by cross-appellant.

I further certify that I am transmitting with said transcript, one of the copies of the reporter's transcript of proceedings at the trial of said cause filed with the designation of contents of the record.

I further certify that pursuant to an order of the Court appearing in the said transcript of record, I am forwarding to the said United States Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced in said cause, being plaintiffs' exhibits 1 to 5 inclusive, and 9 & 10, and defendant's exhibits A to R inclusive.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 13th day of May, 1942.

(Seal)

G. H. MARSH,

Clerk. [168]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Hearing held at Portland, Oregon

Before: Honorable James Alger Fee

January 21, 1941 to January 24, 1941

Mr. Grant: At this time, your Honor, the plaintiff has three pre-trial exhibits, each of which is identified in the pre-trial order and to which no objection was made. Those are pre-trial exhibits 1, 2 and 3, and we offer them at this time.

Mr. Jaureguy: No objection.

The Court: Admitted.

(The documents referred to, so offered and received, were thereupon marked received as follows:

Typewritten copy of Last Will and Testament of Henderson Brooke Deady, consisting of one [25] page of typewritten matter, having previously been marked as Plaintiff's Pre-Trial

Exhibit 1, was marked received as Plaintiff's Exhibit 1;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 1

LAST WILL AND TESTAMENT

I, Henderson Brooke Deady, of the City of Portland, State of Oregon, being of sound and disposing mind and memory, do make, publish and declare the following to be my Last Will and Testament, hereby revoking all other and former wills by me at any time made.

First: I nominate and appoint Robert H. Strong of the City of Portland, State of Oregon, sole executor of this, my Last Will and Testament, and direct that no bond of any sort shall be required of him.

Second: I give, devise and bequeath unto my beloved wife, Charlotte Howell Deady, all my property, real and personal, of every name, nature and kind, wheresoever the same may be situated.

Third: Under Paragraph 8 of the Last Will and Testament of my beloved mother, Lucy A. H. Deady, executed the 29th day of July, 1920, I am authorized and permitted to bequeath by my Last Will and Testament to my wife, the income which would be derived by me, if living, from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term of her natural life. I now, under and by virtue of said Paragraph 8 of my said beloved mother's will, bequeath said income from said two-thirds of Lot 1, Block 212,

City of Portland, State of Oregon, to my beloved wife, Charlotte Howell Deady, for and during the term of her natural life, and nominate and constitute her my appointee under said Paragraph 8 of the said will of Lucy A. H. Deady.

In witness whereof, I have hereunto set my hand and seal this 22d day of October, 1932.

HENDERSON BROOKE DEADY (Seal)

The above and foregoing was duly signed, sealed, published and declared by the said Henderson Brooke Deady to be his Last Will and Testament, in our presence, and we and each of us in his presence and in the presence of each other and at his request signed our names as witnesses thereto on the date therein named and the said Henderson Brooke Deady was at said time, in our opinion, of sound and disposing mind and memory and free from restraint of any sort.

Names	Addresses
RALPH C. DODD	New Milford, Conn.
JOHN S. ADDIS	New Milford, Conn.

[Endorsed]: Filed Feb. 21, 1942.

Typewritten copy of Last Will and Testament of Charlotte Howell Deady, consisting of two pages of typewritten matter, having previously been marked as Plaintiff's Pre-Trial Exhibit 2, was marked received as Plaintiff's Exhibit 2;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 2

I, Charlotte Howell Deady, of New Milford, Connecticut, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other and former wills by me made.

First: I do hereby order and direct that all of my just debts and funeral expenses be paid out of my estate as soon after my decease as possible.

Second: I give, devise and bequeath unto my beloved husband, Dr. Henderson Brooke Deady, all my estate, real, personal and mixed, wheresoever situated, absolutely and forever.

Third: If my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I give, devise and bequeath unto my son, Richard Howell Busek, also known as Richard Howell, my farm in New Milford, Connecticut, consisting of house, barn and approximately sixty acres (60) of land, and all the contents and furnishings of said house and machinery and apparatus and stock and poultry on said farm.

Fourth: In case my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I further give, devise and bequeath unto my beloved

son, Richard Howell Busek, also known as Richard Howell, all my other property, real, personal and mixed, wheresoever situated and of any kind or nature whatsoever, including all money which I may have in any bank or banks at the time of my decease, also all notes, bonds, and stocks, and bonds and mortgages owned by me at the time of my decease, and all debts which may be owing to me at said time.

Fifth: I make no provision for my daughter, Karen Busek, in this, my Last Will and Testament, because she has arrived at her majority and has received her education and is self supporting.

Sixth: I nominate, constitute and appoint Dr. Henderson Brooke Deady to be executor of this, my Last Will and Testament; if my said beloved husband, Dr. Henderson Brooke Deady, should predecease me, I nominate, constitute and appoint my beloved son, Richard Howell Busek, also known as Richard Howell, to be executor of my Last Will and Testament, and direct that no bond or other security be required of either of them for the faithful performance of their duties.

In witness whereof I have hereunto set my hand and seal this fourth day of May, in the year One Thousand Nine Hundred and Thirty-three.

CHARLOTTE HOWELL DEADY (Seal)

Witnessed by:

JOHN M. SCOBLE

MARIVA INGLING

K. COURTENAY JOHNSTON

The foregoing instrument was subscribed, sealed, published and declared by Charlotte Howell Deady, the testatrix above named, as and for her last Will and Testament, in the presence of each of us, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses the day and year above written.

MARIVA INGLING

residing at 259 Edward St.

Ridgewood, N. J.

K. COURTENAY JOHNSTON

residing at 461 West 22 Street

City of New York

JOHN M. SCOBLE

residing at 988 Lincoln Place

Brooklyn, N. Y.

[Endorsed]: Filed Feb. 21, 1942.

Carbon copy of letter, bearing date March 14, 1936, Maguire, Shields and Morrison to Matthew Edward Deady and Hanover Deady, consisting of one page of typewritten matter, having previously been marked as Plaintiff's Pre-Trial Exhibit 3, was marked received as Plaintiff's Exhibit 3.)

Mr. Maguire: And, further, that it could not be construed as any act or admission of Henderson Brooke Deady, who was then deceased; not being his act and not being the act of either the plaintiff here or any predecessor in interest of the plaintiff, it is wholly inadmissible. [27]

The Court: I took it that the point of offering this document was the construction placed thereon by the person in whom the title was at the time of the declaration, and the interest in the property that existed at the time of the declaration. [43]

The Court: As the Court views it, the construction placed upon the will of Henderson Brooke Deady by the administrator is not particularly persuasive, and, in the second place, it is doubtful in my mind as to whether it is binding upon a person who received the property by the terms of the will, if they did so receive it. Some of the things that have been talked about here, not this particular document, it seems to me may be admissible. That is, the construction, if there was a construction, by Henderson Deady I think might be somewhat persuasive. Why the construction placed upon the will of Henderson Brooke Deady should have any relation to it I can't understand, entirely outside of and not connected with these family transactions, at least, and I don't know why he should know what the will meant any more than the Court, and apparently he and the Court did not construe it alike. So it is very doubtful about this piece of evidence and I don't see any ruling for it in that respect.

There is one case where Mr. Jaureguy read from the notes that says anything about the executors and administrators. The Oregon case, on the other hand, shows the testamentary trustee construction, as a matter of fact. My ruling at the present is that I will exclude it.

Mr. Jaureguy: If your Honor please, we would like to have it marked by the reporter as an offered exhibit and an [64] offer of proof.

The Court: Of course, it is in the pre-trial order. I don't know anything about the technicality of it, but anything that is necessary to protect the record.

Mr. Jaureguy: Yes, if it is agreeable, I would like to have the reporter mark it as an offered exhibit, excluded.

Mr. Maguire: May we understand, are these exhibits to be re-marked, or will the markings that are on them——

The Court: (Interrupting) They are marked in evidence as they are offered.

(Said certified photostatic copy of Petition for Probate of the Will of Henderson Brooke Deady, so offered and excluded, having previously been marked as Defendants' Pre-Trial Exhibit A, was marked as offered and excluded on trial.)

DEFENDANTS' PRE-TRIAL EXHIBIT A

In the Circuit Court of the State of Oregon for
the County of Multnomah
Probate Department

No. 36403

In the Matter of the Estate of

HENDERSON BROOKE DEADY,

Deceased.

PETITION FOR PROBATE OF WILL

To the Honorable George Tazwell, Judge of the
above entitled Court:

Comes now Robert H. Strong and respectfully shows to the court that Henderson Brooke Deady died in New Milford, Connecticut on or about the 28th day of May, 1933, and at the time of his death was a resident and inhabitant of New Milford, State of Connecticut, and left an estate consisting of real property situated in Multnomah County, Oregon, consisting of Lots 16 to 21, both inclusive, in Block 3, Mountain View Park #2, Multnomah County, Oregon, of the approximate value of \$100 and with an annual rental value of not exceeding \$5.00, and the right of appointment and bequest to his then wife, Charlotte Howell Deady, of the income from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term of the natural life of the said Charlotte Howell Deady.

That on the 22nd day of October, 1932, the said Henderson Brooke Deady duly made, executed and published his last will and testament, which will was so made, executed and published by him at that time in the presence of Ralph C. Dodd, residing at New Milford, Connecticut, and John S. Addis, residing at New Milford, Connecticut, which will is herewith presented to the court in order that the same may be duly proved and admitted to probate as and for the last will and testament of said Henderson Brooke Deady, deceased.

That at the time of the execution of said will the said Henderson Brooke Deady was over the age of twenty-one years and was of sound and disposing mind and memory, was not acting under fraud, duress or undue influence and was fully capable, mentally and physically, to make and execute his last will and testament.

That in and by the said last will and testament your petitioner, Robert H. Strong, was duly designated, nominated and appointed as executor of the said last will and testament.

That your petitioner, Robert H. Strong, is a resident of Multnomah County, Oregon, and is competent and qualified to act as such executor; that in and by said will your petitioner as such executor is not required to give any bond for the faithful performance and discharge of his duty as executor of said last will and testament.

That decedent left surviving him as his sole and only heir at law his wife, Charlotte Howell Deady,

and the said Charlotte Howell Deady is the sole and only devisee and legatee under said last will and testament.

That it is necessary and proper at this time that said last will and testament of said decedent shall be proved and admitted to probate as by law directed and that the same shall be declared to be the last will and testament of said decedent, and that your petitioner, Robert H. Strong, be appointed as sole executor of the last will and testament and estate of the decedent.

Wherefore, your petitioner prays that an order issue from and out of this court authorizing and directing that the deposition of the said subscribing witnesses to said last will and testament, towit, Ralph C. Dodd and John S. Addis, or such one of them as may be found, be taken in accordance with the provisions of the law of this state for taking depositions, and that in said deposition or depositions the said subscribing witnesses be interrogated as to the execution, making, declaring and publication of said last will and testament and the due witnessing thereof by them, and as to such other matters as may be appropriate to establish the testamentary capacity of the decedent and the validity of said will, and that upon the receipt of said depositions or other proof of the due execution of said will and the testamentary capacity of the decedent that the said will be admitted to probate and recorded and declared and decreed to be the last will

and testament of said decedent, and that this court appoint your petitioner, Robert H. Strong, as sole executor of said last will and testament to serve without bond.

ROBERT F. MAGUIRE

Attorney for Petitioner

State of Oregon,
County of Multnomah—ss.

I, Robert H. Strong, being first duly sworn, say that I am the Petitioner in the within entitled Estate and that the foregoing Petition is true as I verily believe.

ROBERT H. STRONG

Subscribed and sworn to before me this 27th day of June, 1933.

(Seal)

LELAND B. SHAW,

Notary Public for Oregon

My Commission expires Jan. 8, 1935.

[Endorsed]: Office of County Clerk, Multnomah County, Oregon. Filed June 30, 1933. A. A. Bailey, Clerk. F. O. McGraw, Deputy.

State of Oregon,
County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said

County, do hereby certify that the foregoing copy of Petition for probate of Will in the Matter of the Estate of Henderson Brooke Deady, Deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Petition as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D., 1940.

(Seal)

A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: We now offer in evidence Pre-Trial Exhibit B. Defendants' Pre-Trial Exhibit B, which is the inventory and appraisement filed by the executor of the Estate of Henderson Brooke Deady, decedent, on the 14th day of June, 1935, and in that connection I ask Mr. Maguire if he will admit for the purposes of this case that on that date Leland B. Shaw was an assistant in his office? He is the notary public.

Mr. Maguire: Yes, Mr. Shaw was employed in my office at [65] that time.

Mr. Jaureguy: I think there are no further arguments I could make in favor of this document

that I have not already made in favor of the other, I mean on the admissibility of it. I think as far as the weight is concerned it has considerably more weight, because I think the Court will take notice of the fact that when an executor prepares a petition he may not have gone to the extent of trying to ascertain the property, whereas in this case, two years later, when he prepares the inventory and appraisement, I would say it has much more weight as far as the competency is concerned. All the considerations that we have considered before are available here.

The Court: The ruling will be the same.

Mr. Jaureguy: And we ask that this be marked as an offered exhibit.

(Certified copy of Inventory and Appraisement of the Estate of Henderson Brooke Deady, so offered and excluded, having previously been marked as Defendants' Pre-Trial Exhibit B, was thereupon marked as offered and excluded on trial.)

DEFENDANTS' PRE-TRIAL EXHIBIT B

In the Circuit Court of the State of Oregon,
for the County of Multnomah

In the Matter of the Estate of

HENDERSON BROOKE DEADY,

Deceased.

INVENTORY AND APPRAISEMENT

I, A. A. Bailey, County Clerk of the County of Multnomah do hereby certify that Wilbur Falloon Fred Strong and Delmas R. Richmond were duly appointed appraisers of the estate of Henderson Brooke Deady deceased, by order of the County Court, duly entered and recorded on the 10th day of May, A. D. 1935.

Witness my hand and seal of said County Court, this 14th day of June, A. D. 1935.

A. A. BAILEY,

County Clerk,

By T. M. GEOGHEGAN,

Deputy.

State of Oregon,

County of Multnomah—ss.

Wilbur Falloon, Fred Strong, Delmas Richmond, duly appointed appraisers of the estate of Henderson Brooke Deady deceased, being first duly sworn, say and each for himself says, that I will truly, honestly and impartially appraise the property of

said estate which shall be exhibited to me, according to the best of my knowledge and ability.

WILBUR FALLOON

FRED STRONG

DELMAS R. RICHMOND

Subscribed and sworn to before me this 6th day of June, A. D. 1935.

(Seal)

LELAND B. SHAW

Notary Public for Oregon.

My commission expires Jan. 2, 1939.

State of Oregon,

County of Multnomah—ss.

I, Robert Strong the Executor of the estate of Henderson Brooke Deady deceased, being duly sworn, say, that the annexed inventory contains a true statement of all the real and personal property of the said deceased which has come to my knowledge and possession and particularly of all money belonging to the said deceased, and of all just claims of the said deceased against the said

.....
ROBERT H. STRONG

Subscribed and sworn to before me this 6 day of June, A. D. 1935.

(Seal)

LELAND B. SHAW

Notary Public for Oregon

My commission expires Jan. 2, 1939.

Estate of.....Deceased,
 To.....Appraiser, Dr.

To compensation for services in appraising said
 estate, items as follows:

.....days' services at \$.....per day each, \$.....

Necessary disbursements as follows:

State of Oregon,
 County of Multnomah—ss.

Wilbur Falloon, Fred Strong, Delmas Richmond,
 the appraisers above named, being duly sworn, say,
 and each for himself says, that the foregoing bill
 of items is correct and just, and that the services
 have been duly rendered as therein set forth.

WILBUR FALLOON

FRED STRONG

DELMAS R. RICHMOND

Subscribed and sworn to before me this 6 day
 of June, A. D. 1935.

(Seal)

LELAND B. SHAW

Notary Public for Oregon

My commission expires Jan. 2, 1935.

In the Circuit Court of the State of Oregon,
County of Multnomah

In the matter of the Estate of HENDERSON
BROOKE DEADY, Deceased.

INVENTORY AND APPRAISEMENT.

Moneys belonging to the said deceased which have
come to the hands of the Lots 16 to 21 both in-
clusive in block 3 Mountain View Park #2, Mult-
nomah County, Oregon, \$100.00.

Amount carried forward, \$.....

We, the undersigned, duly appointed appraisers
of the estate of.....deceased,
hereby certify that the property mentioned in the
foregoing inventory has been exhibited to us, and
that we appraise the same at the sum set opposite
each item in said inventory set down, and amount-
ing in all to the sum of One Hundred no/100 Dollars,
(\$100.00)

Dated June 6, 1935.

WILBUR FALLOON
FRED STRONG
DELMAS R. RICHMOND

State of Oregon,
County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Re-
corder of Conveyances and Ex-Officio Clerk of the
Circuit Court of the State of Oregon, for the County

of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Inventory and Appraisement in the Matter of the Estate of Henderson Brooke Deady, Deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Inventory and Appraisement as the same appears on file in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal)

A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942

Mr. Jaureguy: We will call Mr. Weinstein. [66]

SAMUEL B. WEINSTEIN

was thereupon produced as a witness in behalf of the defendants herein and, having first been duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

A. Samuel B. Weinstein.

(Testimony of Samuel B. Weinstein.)

Direct Examination

By Mr. Jaureguy:

Q. Mr. Weinstein, you are a resident of Portland? A. I am.

Q. And what is your profession?

A. Lawyer.

Q. How long have you been practicing your profession here? A. Since 1922.

Q. And has that been continuous, in this city?

A. It has.

Q. And, accordingly, you were practicing your profession in 1933, 1934 and 1935?

A. I have been.

Q. 1923, '24 and '25, and ever since then up to the present time? A. Correct.

Q. Now, are you acquainted with Amalie B. Deady?

A. I was acquainted with her.

Q. And did you ever represent her as her attorney? [67]

A. I did represent her in a divorce suit.

Q. In what connection?

A. I represented Mrs. Amalie B. Deady in a divorce suit of Henderson B. Deady versus Amalie B. Deady.

Q. Now, were there any negotiations for a property settlement in connection with that divorce suit? A. There were.

(Testimony of Samuel B. Weinstein.)

Q. And with whom did you conduct those negotiations?

A. I conducted those negotiations with Attorney Chester V. Dolph.

Q. And in connection with those negotiations did you ever talk to Henderson Brook Deady?

A. I did.

Q. And when was that?

A. That was sometime during the year 1925.

Q. Could you tell us about when those negotiations started?

A. Started sometime in the summer, I think in June, and went through to September, 1925.

Q. I wish you would just tell us what those negotiations were, giving us the names of the parties and the occasions, as nearly as you can remember.

Mr. Maguire: You mean the subject of the negotiations?

Mr. Jaureguy: Yes.

Mr. Maguire: Or the conversations?

Mr. Jaureguy: Yes. [68]

Mr. Maguire: Which?

Mr. Jaureguy: Conversations.

Mr. Maguire: Well, as to any conversations alleged to have been held between this witness and Chester V. Dolph, we object to them as being wholly incompetent to prove or disprove any issue in this case, not binding upon plaintiff herein, and not competent to prove or disprove the testamentary

(Testimony of Samuel B. Weinstein.)

intention of Lucy A. H. Deady, and not made or had with any person claiming or having any legal right under the will of Lucy A. H. Deady, therefore, wholly irrelevant and immaterial.

Now, then, so far as the statements, or alleged statements or conversations had between this witness or in his presence and with Henderson Brooke Deady, we also object that those are wholly incompetent and irrelevant to prove or disprove any issue in this case, for the reason that the intention of the testator cannot be proved or disproved by such testimony; and, further, that the conversations, if any, were not had between, nor related to the rights of any person, with a person claiming to have any right, title or interest under the will of Lucy A. H. Deady.

The Court: You may answer this question. I don't think there are other matters involved at present.

The Witness: Will you please read that question for me?

(The question referred to was thereupon read.)

A. Does that sort of permit me to give the background of this [69] matter, your Honor?

The Court: No; just answer.

A. In 1925 I was in the office of Charles C. Hindman, then an attorney, a practicing attorney, in the city of Portland. The matter of a divorce

(Testimony of Samuel B. Weinstein.)

between Henderson Brooke Deady and Amalie B. Deady came to his attention through a firm of New York attorneys. He requested that I handle that matter and I started to investigate the circumstances concerning that particular problem. In that investigation I discovered that Chester V. Dolph was the attorney representing Dr. Henderson Brooke Deady. The question at that time was as to whether or not Amalie B. Deady, the client of our office, could obtain a divorce in the state of Oregon. I was satisfied that she did not have the required residential period to file for divorce and I so advised the correspondent attorneys in New York, that she was then living in New York and she would have to establish a residence in the state of Oregon for at least one year prior to the commencement of any suit for divorce. I suggested, however, in light of the situation, that she file a——

Mr. Maguire: (Interrupting) If the Court please, I object to this as not being responsive to the question.

The Court: Well, it is obviously not. Objection sustained.

Mr. Jauregui: Q. Then at some subsequent—after that investigation that you spoke about did you negotiate with [70] Henderson Brooke Deady and his attorney with respect to this?

A. Subsequently, in the lapse of some months, I did negotiate with reference to a divorce suit and property settlement between the parties, and

(Testimony of Samuel B. Weinstein.)

in those negotiations I carried it on with Chester V. Dolph and on two occasions with Dr. Henderson Brooke Deady in person in the office of Chester V. Dolph. The result of the negotiations was a stipulation with reference to some property arrangements, with reference to other payments of money, which was reduced to writing and made a part of the decree that was subsequently entered in the Circuit Court of Multnomah County, in which a decree of divorce was granted to Amalie B. Deady and the property settlement was incorporated therein.

Q. Now, in connection with these negotiations and conversations you had with Dolph and with Henderson Brooke Deady was there any conversation with respect to what Henderson Brooke Deady got under the will of his mother?

A. There was.

Mr. Maguire: Just a moment. We object to that on the same ground, and on the further grounds that the question itself is indefinite and would include both conversations had with C. V. Dolph and with Henderson Brooke Deady, without any distinction between the two. I cannot make my objections—I think there is a separate ground of objections with regard to Dolph's statements than there would be with regard to Dr. [71] Deady.

The Court: I think the question as to Henderson Brooke Deady should be separated.

Mr. Jaureguy: Q. Whom did you talk to first in

(Testimony of Samuel B. Weinstein.)

connection with these negotiations, to Henderson Brooke Deady or to his attorney?

A. To his attorney first.

Q. And in connection with your investigations with his attorney was there any discussion as to what Mr. Deady got under the will of his mother?

A. Yes, very thorough discussion.

Q. And what was that?

Mr. Maguire: Object to that upon the same grounds as heretofore suggested to your Honor, unless your Honor desires me to again elaborate.

The Court: Well, I think we had better establish a *modus operandi* here. I want all this testimony to go into the record, whatever my rulings are, in order that the whole record may be prepared, in the event that I have the power to include it in the record, in whatever form it will best protect the rights of the parties in an offer of proof as to testimony. I am not at present convinced that the declarations of an attorney in dealing with this matter are competent. I therefore reject it and will proceed to take the testimony in the record.

Mr. Jaureguy: All right. Then I think we do not need to [72] save the formal exception under the rules.

The Court: No, I think not, Mr. Jaureguy. For the purpose of this case, if there is any question about that, I will give you an exception every time

(Testimony of Samuel B. Weinstein.)

that you get me to rule and I rule contrary to an objection that is made by either side.

Mr. Jaureguy: Very well.

Q. Now, will you just state what the conversations were with Chester Dolph?

A. Mr. Dolph tried to convey to me the situation that Dr. Henderson Brooke Deady had no substantial resources with which to make the kind of property settlement that I was urging as a protection for Mrs. Amalie B. Deady. I was then of the impression that he was in a position to make a——

Mr. Maguire: Pardon me. I must object. We are talking about conversations, and I think the witness should limit himself to what the conversations were and not to his impressions or conclusions from it. It makes it a little difficult in the record, and I know how difficult it is for a lawyer to testify.

A. All right, I will try to do that.

The Court: Yes. I desire to have listed the conversations as they were and, as far as you can, you will form definite expressions.

A. I will try to, your Honor.

The Court: And without too much interjection from the Court.

A. I was requesting a substantial sum of money, either in [73] cash or in installments over a period of years, for Mrs. Deady. Mr. Dolph stated that that was not possible, that he was receiving—that

(Testimony of Samuel B. Weinstein.)

is, that Henderson Brooke Deady was receiving a small income out of some property devised to him by his mother, and that under the terms of his mother's will all that Henderson Brooke Deady has was a power of appointment, that that power of appointment must be exercised in favor of his wife. That was the statement made to me by Mr. Dolph.

Mr. Jaureguy: Q. Prior to the time that you talked to Mr. Dolph *that* you read the will of Lucy A. H. Deady?

A. I was furnished a copy of that will by Mr. Dolph and I read it.

Q. And how many conversations did you have with Mr. Dolph?

A. Oh, it extended over a period of several months.

Q. Now, you say that Mr. Dolph pointed out to you that all that Henderson Brooke Deady had was the income and the power of appointment in favor of his wife. Did he make any statement as to whether or not Mr. Deady would exercise that in favor of your client?

A. He made the statement that he would not exercise it in favor of my client unless some reasonable arrangement could be arrived at.

Q. Now, thereafter you say you had conversations in his office when Mr. Deady was present?

A. Yes. [74]

Q. And was Mr. Dolph also present?

(Testimony of Samuel B. Weinstein.)

A. Yes.

Q. I think you said there were two of those occasions?

A. Two occasions that I had towards the conclusion of the negotiations. We had, I recollect, a conference in Mr. Dolph's office in the Mohawk Building when Dr. Henderson Brooke Deady was present, Mr. Dolph, and myself.

Q. Now, will you just state the conversations that took place on those two occasions.

Mr. Maguire: To the receipt of this testimony in response to this question the plaintiff objects on the ground that it is not competent to prove or disprove any issue in this case, that it does not prove or is not competent to prove or disprove the testamentary intent of Lucy A. H. Deady, that it would not be binding upon Henderson Brooke Deady if he were alive and a party to this litigation and is not binding upon the plaintiff here, and that it is not a conversation had in the presence of or affecting the rights or to one having any rights under the will of Lucy A. H. Deady, and it is not part of a family settlement under any rule contended for by the defendants, and does not constitute a matter of estoppel.

Mr. Jaureguy: I want to make one correction there. He can talk about—oh, family settlements under the rule contended for by defendants?

Mr. Maguire: Yes. [75]

Mr. Jaureguy: Yes, I think I gave your Honor

(Testimony of Samuel B. Weinstein.)

sufficient authorities here that this construction by interested parties is by no means limited to family settlements. In fact, in *Stubbs vs. Abel* it was a representation made by one of the devisees to a third person, that is, to the Court, in which the remainder of the parties were not involved, as I recall. At any rate, there were many of the other cases here where there is merely the construction, and the family settlement part of it was merely in the court case, and that is just by inference that they have put a family settlement there, but that document was not really a family settlement, but merely a representation.

The Court: If you desire to ask the question, I can state offhand that my impression is that the question is probably competent, this evidence as to what Henderson Brooke Deady said.

Mr. Jaureguy: You say your offhand impression is that it is competent?

The Court: It is competent and should be admitted. If you wish to argue the matter I will hear you.

Mr. Jaureguy: Well, if it is your offhand impression I would rather wait until somebody indicates that you got rid of that impression before I argue it. It is in our favor.

Mr. Grant: If your Honor please. I would like to state this, to go back to *Stubbs vs. Abel* and these other cases, [76] you take these cases of

(Testimony of Samuel B. Weinstein.)

practical construction by interested parties, everyone of them, I believe,—and we have been through that annotation—is a case where the heirs under the will were making a family settlement or a case where there is an actual basis for an estoppel between the parties involved in the present litigation, or where cases where the property had been distributed to the heirs under the will being challenged and that distribution had been acquiesced in, like the dividing line on top of the ridge case that was mentioned. The cases, many of them, go further and have specific agreements.

Now, in the Oregon cases that were cited, we had one a case where as between the interested parties to a trust one of them had come in asking for an instruction from the Court on a theory which he now has repudiated and the result of which was to give him more money out of that trust. They were directly affected. This particular testimony would be his statement to some third person not affected in this case, not affected by the will, as far as its interpretation between these boys and Henderson Brooke Deady is concerned.

The Court: But was a person in the interest of a person who was connected.

Mr. Grant: Yes, Henderson Brooke Deady.

The Court: No, his wife.

Mr. Grant: His wife was interested in knowing what the will gave him, that is true, just the same as a creditor might— [77]

(Testimony of Samuel B. Weinstein.)

The Court: (Interrupting) No, there were two of them that were interested in the will, isn't that true?

Mr. Grant: The two parties talking, you mean?

The Court: Yes.

Mr. Grant: Were interested in what the will contains.

The Court: In other words, you draw a distinction between two members of the family and all the family.

Mr. Grant: On a family settlement, I am talking about a settlement between the heirs under a will who agree on a certain construction and either write it out in a contract or divide it up and abide by it. That is the kind of thing the courts say they ought to go a long ways to uphold. That is not the situation here, and this is not claimed to be the basis for any settlement between Henderson Brooke Deady and the other heirs, neither is it claimed as a basis for an estoppel where the result of the action resulted either to his benefit or to their detriment, and we do not think simple extraneous observations by Henderson Brooke Deady are competent to show either her intent or admissible as his construction of the will. Extraneous evidence is not admissible just because somebody, somewhere in the chain of title somewhere, made a statement concerning it.

The Court: That is not the ordinary rule, is it?

(Testimony of Samuel B. Weinstein.)

Is that the ordinary rule about the statements of an ancestor in relation to real property? [78]

Mr. Jaureguy: Any statement made by an ancestor—that is an entirely different rule, as your Honor recalls, than the rule we have been talking about here. There is still a different rule, which is statutory in this state, that any statement made by an owner with respect to his real property is admissible as against his successor in interest. That is still a different rule.

Mr. Maguire: That rule has no application here.

Mr. Jaureguy: Well, it does have application here, because the statements that Henderson Brooke Deady made were contrary to his interest, because the statements that he made were that he only had a life estate, or a defeasible fee, and they were adverse to his interest, and if it is material what they were talking about, that she had an interest, she not only had an interest in showing that she had rights as a creditor, but that she had a dower interest, if she had an interest in fee. If she got a divorce from him, under the statutes she would be entitled to one-third of his two-thirds. So it is more than the rights of a creditor, and certainly it would be admissible either under a construction of the will or under his statements adverse to the title to the property.

Mr. Maguire: Certainly it is not what his title was, because his title is fixed by an instrument

(Testimony of Samuel B. Weinstein.)

which he had nothing to do with, the validity of which instrument is not in question. In other words, it is construing the intentions of the [79] testator, Lucy Deady. If Lucy Deady meant one thing, then he had a certain estate; if she meant something else he has a less estate. Now, his conclusions as to what she meant—and that is all this can be competent upon, because you can't divest his title, if it once vested in him under that will, by any action or statement which he ever made to anybody.

The Court: Now, I am just wondering about that, **whether that is true or not.**

Mr. Maguire: Well, I think without any question that that is the law, your Honor. The title can only be divested by conveyance.

The Court: Well, I am not so sure about that, either. I can still be convinced on that point. As I understand, statements of an ancestor in the construction of a deed of title can be introduced in evidence as against the successor, limiting his title, or saying that he does not claim a particular interest, where there is a possible ground to contest on.

Mr. Maguire: That can only come up as to boundary lines, as to where a boundary is, or about a question of an estoppel.

The Court: Well, I ask for your authority on that.

Mr. Maguire: Well, your Honor, I don't know

(Testimony of Samuel B. Weinstein.)

whether I have got the authorities here on that particular point.

The Court: I will take a recess while you are looking that up.

(A short recess was thereupon had, after which [80] proceedings were resumed as follows:)

The Court: The Court will receive testimony and reserve ruling.

The Witness: Will you read me the last question.

Mr. Jaureguy: Q. The question, as I recall, is the conversations that took place on those two occasions when Henderson Brooke Deady and Mr. Dolph were present.

A. Dr. Deady stated on both of those occasions, the substance of his statement was, that he had nothing under the will except a life estate with a power of appointment under will, by will, to a wife if he had a wife at the time of the last will of his. He stated further at the time that all that he was getting out of the property was some small income after certain other charges were being first made. That was the substance of his statement as far as negotiations were concerned.

Q. Did he say anything about possible children? You say you read the will. A. Yes.

Q. And it provides that if he died without issue the two-thirds should go to Hanover and Matthew Deady. Did he say anything about whether he had or would have any children?

(Testimony of Samuel B. Weinstein.)

A. Well, my recollection is that there were no children, he had no children. My recollection is that he was a man quite well advanced. He did not talk about future issue, as I recall.

Q. Now, was there anything said by Mr. Deady on those occasions, [81] or on either of those occasions, with respect to the circumstances, if any, under which he would exercise the power of appointment?

A. Yes, in these negotiations——

Mr. Maguire: We object to that as being wholly irrelevant to any issue in this case and wholly incompetent to prove or disprove any issue of the case.

The Court: The testimony will be received subject to objections. The Court will reserve ruling.

A. Yes, he suggested that if we could enter into a stipulation of the kind that he wanted to, that he would exercise the power in order to provide that Amalie B. Deady be given what he wanted to give her on a monthly income basis. The stipulation was in writing and, as I recall it, provided that he would make payments——

Mr. Maguire: (Interrupting) We submit that the document is the best evidence as to its contents.

Mr. Jaureguay: Q. Did he say how he could provide for her under the power of appointment if she wasn't his widow?

A. Well, I recall this suggestion, that he contemplated remarrying at that time and shortly after

(Testimony of Samuel B. Weinstein.)

this remarriage he would enter into—he would, in order to carry out this understanding, he would by last will and testament make this appointment under the will of Lucy A. H. Deady to his then wife; she in turn would enter into an agreement in writing that in consideration [82] of his exercising the power of appointment she would assume the obligation as a charge upon that power to pay out of the income the amount called for by the stipulation to be paid to Amalie B. Deady.

Q. Then as a result of those negotiations did you enter into a compromise settlement?

A. It finally resulted in a stipulation of a property settlement between the parties.

Q. Now, I wish to hand you Defendants' Pre-Trial Exhibit C and ask you whether included in that exhibit is a copy of that agreement?

A. Yes, that purports to be it.

Q. That is, the first couple of pages are of the complaint in the case of Henderson Brooke Deady against Amalie B. Deady, and then attached to that is an agreement. Is that the agreement that the parties entered into?

A. That is the agreement that the parties entered into.

Q. Did Amalie B. Deady agree to that?

A. Mr. Deady signed that and Amalie B. Deady signed it, executed in my presence and the presence of Mr. Dolph and the presence of Gertrude L. Mil-

(Testimony of Samuel B. Weinstein.)

liken, who was then my office stenographer. The signatures of Dr. Henderson B. Deady and Amalie B. Deady were acknowledged by me as a notary.

Q. And did you advise Mrs. Deady to sign it?

A. I did. [83]

Q. And in advising her did you rely on these statements that had been made to you by Henderson Brooke Deady respecting what interest, if any, he had in the real property?

Mr. Maguire: Just a moment. May I ask a preliminary question here to an objection?

The Court: Yes.

Mr. Maguire: You saw a copy of the will of Lucy A. H. Deady?

A. Yes, I did.

Mr. Maguire: Saw it before these negotiations were concluded?

A. Correct.

Mr. Maguire: Studied it?

A. Yes.

Mr. Maguire: Noted its provisions?

A. Noted its provisions, yes, sir.

Mr. Maguire: And the only conversation with regard to this particular subject matter was that which you have heretofore related?

A. Well, strictly speaking, Bob, there were a lot of conversations about that will with others than Henderson Brooke Deady and Chester V. Dolph.

(Testimony of Samuel B. Weinstein.)

Mr. Maguire: Well, I am talking about those with Henderson Brooke Deady.

A. That is all, on two occasions. [84]

Mr. Maguire: So what those contained and what the estate vested in him was, in your knowledge, irrespective of any statements that he or his attorney made with regard to the legal effect thereof?

A. Oh, I had independent knowledge of what I considered the will to be and what others considered the will to be. When I am saying others, I want to say in fairness to the situation that Mr. Hindman was a practicing lawyer, and Prescott Cookingham was, and they were attorneys involved in this situation with me, and when I say I talked with them, they were attorneys that were cognizant of the situation.

Mr. Maguire: I see. We object to the testimony as to whether or not he relied upon statements made either by Dr. Henderson Brooke Deady or Chester V. Dolph, upon the ground that the facts and circumstances upon which these statements could be based all arose out of the will itself, of which he had a copy and was cognizant and familiar with, and, therefore, the reliance is wholly immaterial and incompetent to prove any issue.

The Court: The ruling is reserved, dependent upon the other ruling.

Mr. Jaureguy: I take it that the witness may answer.

A. Will you restate the question, please.

(Testimony of Samuel B. Weinstein.)

(The last question propounded by counsel for defendants on direct was thereupon read, [85] as follows:

“And in advising her did you rely on these statements that had been made to you by Henderson Brooke Deady respecting what interest, if any, he had in the real property?”)

A. I would say that I was partially relying on their contentions and claims with reference to their interest under the will.

Mr. Jaureguy: Q. And pursuant to your advice Mrs. Deady signed that stipulation?

A. Correct.

The Court: Who do you mean by “their”?

Mr. Jaureguy: Who? Me?

The Witness: I meant his.

The Court: The witness uses the word “their”, “their contentions”. I want to know, who do you mean by “their contentions”?

A. “Their contentions”, I mean Henderson Brooke Deady and Chester V. Dolph.

Mr. Jaureguy: Q. Now I wish you would take that Defendants’ Pre-Trial Exhibit C again and look at the second paragraph contained in the stipulation, and I ask you if that is the paragraph that was intended to carry out the agreement that you had with respect to the power of appointment?

A. That is correct. That states the intention and the [86] provision that Henderson Brooke Deady

(Testimony of Samuel B. Weinstein.)

undertakes to exercise the power in order to make a charge upon that power of the amount required to be paid by him to Amalie B. Dedy under this stipulation.

Q. Now, in your conversations with Henderson Brooke Dedy and his attorney, Chester V. Dolph, was there any difference or inconsistencies between the representations that those two men made to you on what Henderson Brooke Dedy got under this will?

A. None whatever. They were both claiming the same thing.

Q. And that complaint, as I understand, is signed by Chester V. Dolph as attorney for Henderson Brooke Dedy? A. That is correct.

Mr. Jaureguy: We would like to offer Defendants' Pre-Trial Exhibit C in evidence.

DEFENDANT'S PRE-TRIAL EXHIBIT C

In the Circuit Court of the State of Oregon
for Multnomah County

HENDERSON BROOKE DEADY

Plaintiff

vs.

AMALIE B. DEADY

Defendant

Comes now the plaintiff above named and for cause of suit against the defendant above named alleges as follows:

(Testimony of Samuel B. Weinstein.)

I

That plaintiff now is and for more than one year last past immediately prior to the commencement of this suit has been an inhabitant and a bona fide resident of the County of Multnomah, State of Oregon.

II

That the plaintiff and the defendant lawfully intermarried at New York City, State of New York on or about the 30th day of May, 1902 and ever since said time they have been and now are husband and wife.

III

That ever since said marriage and during all the time herein mentioned plaintiff has been to the defendant an affectionate, true and faithful husband.

IV

That on or about March, 1910 at New York City, State of New York the said defendant, disregarding the solemnity of her marriage vows, wilfully and without cause, deserted and abandoned plaintiff and ever since has and still continues to so wilfully and without cause desert and abandon plaintiff and to live separate and apart from him without sufficient cause or any cause or reason and against his will and consent.

V

That there is no issue of said marriage, and the property rights of plaintiff and defendant have

(Testimony of Samuel B. Weinstein.)

been settled in accordance with a stipulation marked Exhibit "A" attached hereto and by reference thereto made a part hereof

VI

That said desertion of plaintiff by defendant remains uncondoned and unforgiven by him.

Wherefore plaintiff prays that the bonds of matrimony now existing between himself and defendant be dissolved and for such other and further relief as to this Honorable Court may seem meet and equitable.

CHESTER V. DOLPH

Attorney for Plaintiff

EXHIBIT "A"

In the Circuit Court of the State of Oregon
for the County of Multnomah

HENDERSON BROOKE DEADY

Plaintiff

vs.

AMALIE B. DEADY

Defendant.

STIPULATION AND AGREEMENT.

Whereas unhappy differences have arisen between the above named Henderson Brooke Deady and the above named Amalie B. Deady, his wife; and

(Testimony of Samuel B. Weinstein.)

Whereas, suit for divorce is about to be instituted in the above entitled Court by the said Henderson Brooke Deady against the said Amalie B. Deady; and

Whereas, the said parties to this agreement, to wit: the said Henderson Brooke Deady and the said Amalie B. Deady, his wife, in contemplation of the rendering and entering of a decree in said suit, have agreed between themselves as to a division and settlement of their property rights;

Now, therefore, provided and in the event that the Court shall grant a decree herein in favor of either party, dissolving the bonds of matrimony existing between the parties hereto, it is mutually agreed and understood;

1. That forthwith and with the entry of said decree the said Henderson Brooke Deady shall pay to the said Amalie B. Deady the sum of \$2500.00 in cash, and in addition to said cash payment the said Henderson Brooke Deady for himself, his heirs, executors and administrators further agrees to pay unto the said Amalie B. Deady, conditioned upon the entry of said decree, and for a period of twenty years thereafter monthly installments payable as follows:

(a) As and for the first day of September, 1925, and for a period of 11½ years from said date, the sum of \$75.00 per month, said installment to be payable on the first day of each month at such place and to the order of the said Amalie B. Deady

(Testimony of Samuel B. Weinstein.)

as she may direct; and for a period of 11½ years next following, the sum of \$100.00 per month payable on the first day of each month thereafter at the place and to the order of the said Amalie B. Deady as she may designate, and for the balance of said twenty year period, \$200.00 per month payable on the first day of each month in like manner to be designated by the said Amalie B. Deady; provided, however, that the said monthly payments herein provided for shall cease upon the death of the said Amalie B. Deady if same shall occur prior to the termination of the said twenty year period herein provided.

(b) The said herein Henderson Brooke Deady herein agrees, conditioned upon the entry of said decree as aforesaid, to forthwith make, execute and deliver to the said Amalie B. Deady, his promissory note payable to her order evidencing the obligation provided in the foregoing paragraph (a), said promissory note to be in the customary form excepting that it should be non-interest bearing, save in default of the payment of any installment, when due, in which event said installment or installments shall bear interest from the respective dates of maturity thereof.

2. That said Henderson Brooke Deady hereby further expressly agrees in consideration of the settlement of the property interests of the parties hereto, always conditioned, however, on the entry of said decree, to exercise by his last will and testa-

(Testimony of Samuel B. Weinstein.)

ment, within one year from the entry of said decree the power of appointment contained in the will of Lucy A. H. Deady, deceased, of Portland, Oregon, mother of the said Henderson Brooke Deady, wherein the said deceased did give, devise and bequeath to the said Henderson Brooke Deady the undivided two-thirds of Lot numbered One (1), Block numbered Two hundred twelve (212), City of Portland, Multnomah County, Oregon, conditioned as in said will provided and wherein the said Lucy A. H. Deady authorized and empowered the said Henderson Brooke Deady, if he so elected, to bequeath by his last will and testament to his wife (if he then has a wife), the income that would have been derived to him, if living, from the two-thirds of said real property hereinbefore described; said bequest to continue, however, only during the lifetime of the widow of the said Henderson Brooke Deady; that he, the said Henderson Brooke Deady, does expressly agree to exercise the said power of appointment by his said last will and testament in such manner and to the effect that the payments herein provided to be paid by him to the said Amalie B. Deady shall be a fixed and prior charge upon the devise, estate, legacy or interest resulting from the exercise of said power by him. It being expressly agreed to exercise said power of appointment so that the beneficiary or appointee thereof shall receive and assume said devise, estate or interest or

(Testimony of Samuel B. Weinstein.)

bequest, charged with the condition upon the payment by said beneficiary or appointee, of all payments herein provided to be paid by the said Henderson Brooke Deady to the said Amalie B. Deady, and that this agreement shall create and constitute a lien and charge on said power and/or the interest acquired by said appointee or beneficiary thereunder for the purpose of securing the performance of the said Henderson Brooke Deady's obligations hereunder. And the said Henderson Brooke Deady hereby further expressly agrees to execute such other and further documents or agreements and/or to take any other step or steps necessary to legally effectuate the obligation herein agreed to be performed with reference to said exercise of said power of appointment by him.

3. The said Henderson Brooke Deady further agrees for himself, his heirs, executors and administrators, conditioned always upon the entry of said decree as aforesaid, to pay unto the said Amalie B. Deady or order, the sum of \$1500.00 on or before December 1, 1926, in full satisfaction and discharge of any and all counsel fee or fees incurred by her to date of decree, such sum to be evidenced by the promissory note of the said Henderson Brooke Deady bearing the date of entry of said decree payable on or before said December 1, 1926, bearing interest from date at the rate of seven per cent. per annum and containing the customary provision therein provided for the adjudging of reasonable

(Testimony of Samuel B. Weinstein.)

attorney's fees in case suit or action should be brought thereon to collect the same or any part thereof.

4. All the covenants, payments, stipulations, agreements and provisions herein contained shall apply to, bind and be obligatory upon the heirs, executors, administrators and assigns of the parties to this agreement whether so expressed or not.

It is further mutually understood and agreed by and between the parties hereto that this agreement shall have no force, and be binding upon neither of them excepting in the event of the decree of divorce dissolving the bonds of matrimony between them; that the Court may and shall embody and cover in its decree in said suit to dissolve said marriage the terms and provisions of this stipulation, and that the said Amalie B. Deady agrees to, and shall accept the said payment of \$2500.00 cash herein agreed to be paid her and the receipt of said promissory notes herein agreed to be executed and delivered to her in the manner and conditioned as herein provided, and the full and complete performance by the said Henderson Brooke Deady of each and every other covenant and obligation hereinabove agreed to be performed by him, as and for the full, satisfactory, reasonable and sufficient settlement of all claims of every nature whatsoever which she now has against the said Henderson Brooke Deady.

(Testimony of Samuel B. Weinstein.)

In witness whereof the parties hereto have hereunto set their hands this 14th day of September, 1925.

(Sgd) HENDERSON B. DEADY

HENDERSON BROOKE DEADY

(Sgd) AMAILE BUSCK DEADY

Executed in the

Presence of Witnesses:

(Sgd) CHESTER V. DOLPH

(Sgd) SAMUEL B. WEINSTEIN

(Sgd) GERTRUDE L. MILLIKEN

State of Oregon

County of Multnomah—ss.

On this 14th day of September, 1925, before me a notary public in and for said county and state, personally appeared the within named Henderson Brooke Deady who is known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

In testimony whereof, I have set my hand and official seal hereto the day and year last above written.

(Seal) (Sgd) SAMUEL B. WEINSTEIN

Notary Public for Oregon

My commission expires Dec. 11, 1926.

(Testimony of Samuel B. Weinstein.)

State of Oregon

County of Multnomah—ss.

On this 14th day of September, 1925, before me a notary public in and for said county and state, personally appeared the within named Amalie B. Deady who is known to me to be the identical individual who is described in and who executed the within instrument and acknowledged to me that she executed the same freely and voluntarily.

In testimony whereof, I have set my hand and official seal hereto the day and year last above written.

(Seal)

(Sgd) SAMUEL B. WEINSTEIN

My commission expires Dec. 11, 1926.

State of Oregon,

County of Multnomah—ss.

I, Henderson Brooke Deady being first duly sworn, do depose and say that I am the plaintiff in the above entitled suit; and that the foregoing complaint is true as I verly believe.

HENDERSON BROOKE DEADY

Subscribed and sworn to before me this 15th day of September, 1925.

(Seal)

CHESTER V. DOLPH

Notary Public for the State
of Oregon.

My commission expires.....

State of Oregon

County of Multnomah—ss.

Due service of the within Complaint is hereby accepted in Multnomah County, Oregon this 15th day of September 1925, by receiving a copy thereof, duly certified to as such by Chester V. Dolph, Attorney for Plaintiff.

(Seal)

STANLEY MYERS

District Attorney for Mult. Co., Or.

By SAM'L H. PIERCE

Deputy.

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey county clerk and ex-officio clerk of the Circuit Court of the state of Oregon for the county of Multnomah, a court of record. Do hereby certify that the foregoing copy of Complaint and Exhibit (Henderson Brooke Deady, Plaintiff, vs. Amalie B. Deady, Defendant) No. L-3801 has been compared by me with the original and that it is a correct transcript therefrom, and of the whole of such original Complaint and Exhibit as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 6th day of May, A. D. 1940.

A. A. BAILEY

County Clerk

By MARY DUNKIN

Deputy

[Endorsed]: Filed Feb. 21, 1942.

(Testimony of Samuel B. Weinstein.)

The Court: I think this all depends upon the pending question, the ruling on which is reserved.

Mr. Grant: May it be understood that we do have a continuing objection to all of this, both the statements and the result of his conversation?

The Court: I assume that is correct. I was ruling on that basis.

Mr. Jaureguy: You may take the witness.

Cross-Examination

By Mr. Maguire: Q. Mr. Weinstein, when did you first know of [87] or see a copy of the will of Lucy A. H. Deady?

A. I saw it sometime during the negotiations, or even prior to the negotiations. I saw it sometime after June of 1925, when the attorneys representing Mrs. Deady received a communication from Webb, Petterson & Hadley, of New York.

Q. Was a copy of the will transmitted with those communications?

A. I cannot say definitely, but in my files of some fifteen years ago, some seventeen years ago, I found some copies of wills.

Q. Some copies of wills?

A. Of the will of Lucy A. H. Deady. Whether it was procured here or transmitted by Webb, Petterson & Hadley I cannot tell.

Q. Their letters to you do not state whether or not they are enclosing a copy of the will?

A. No, they do not; that is, in the part that I

(Testimony of Samuel B. Weinstein.)

have in my files. I might explain, in that connection, that Mr. Prescott Cookingham had a file, Mr. Charles C. Hindman had a file, and I had a file, and all I can discover from my files is just portions of correspondence that we had with Webb, Pettersson & Hadley. Some of them are missing.

Q. Well, it is a fact, is it not, Mr. Weinstein, that you had a copy or had examined a copy of the Lucy A. H. Deady will prior to the time that these negotiations and conversations [88] that you mention took place?

A. That is correct.

Q. And did you and your co-counsel examine the will? A. I think we did.

Q. So that when Chester Dolph or Dr. Deady talked with you you knew as much about the contents of the will as anyone did, didn't you?

A. As prior to Chester Dolph's talking to me?

Q. I say, at the time they talked to you you knew as much of the contents of the will as anybody else did?

A. Well, I think I did. I construed the will to the best of my ability.

Q. Have you with you the correspondence which you mention there with the Petterson Company?

A. I have all the file that we have.

Q. Have you any objection to my looking at it?

A. Not at all. You are welcome to it.

Mr. Maguire: Thank you.

(Counsel for plaintiff then examined said file.)

(Testimony of Samuel B. Weinstein.)

Mr. Maguire: Q. Now, the situation between yourself, representing Mrs. Deady, Mrs. Amalie Deady, and Chester V. Dolph, representing Dr. Henderson Brooke Deady, and the Doctor was simply this, that you were endeavoring to get as much for your client and they were endeavoring to pay as little?

A. That is a correct assumption. [89]

Q. And you were dealing at arm's length, were you not? A. Correct.

Q. And you did not rely upon their statement of the provisions of the will, did you?

A. Well, now, to answer that question, I think I would like to explain it. Now, you say "rely". Whether I absolutely, without any knowledge of my own, relied solely upon what they said, no, I did not rely solely on what they said, but in negotiations in matters of this kind it is reasonable and ordinary for persons to listen to their contentions, which I did, and that was their contention, and, coupled with their contention, the phrasing of the will, my investigation from other sources led me to believe that the best deal I could make was embodied in the stipulation.

Mr. Maguire: And may I have Exhibit C for a moment.

Q. Now, there was no provision made in the stipulation agreement, which you state was executed by the parties, whereby—withdraw that ques-

(Testimony of Samuel B. Weinstein.)

tion. Was there ever any other writing passed in or executed by the parties, or by Charlotte Howell Deady, made at or about the time this settlement was entered into?

A. None that I recall.

Mr. Maguire: That is all, thank you.

Redirect Examination

By Mr. Jaureguy: Q. Now, this paragraph 2 of the stipulation, which, as you say, was intended to [90]

carry out the agreement of Charlotte making the agreement, and so on, did you have any particular reason for not detailing the exact mechanics of that in the stipulation?

Mr. Maguire: May it please the Court, where negotiations have resulted in a written contract, testimony of this kind is wholly inadmissible and incompetent, under the statute.

The Court: That is correct. The objection is sustained, unless it involves a statement or construction of the will of Lucy A. H. Deady by Dr. Deady.

Mr. Jaureguy: Well, it does not—

The Court: (Interrupting) If there is some conversation of that sort, I don't care what it is—

Mr. Jaureguy: (Interrupting) Well, the conversation has been given, and counsel's statement seems to indicate that the stipulation is inconsistent with the conversation, and that is why I want to ask him why the matter in the conversation was

(Testimony of Samuel B. Weinstein.)

not put in so many words in the stipulation. Now, counsel's statement of the parol evidence rule has no effect in this state where strangers to the agreement are involved; our Supreme Court has held that many times. But, further than that, we are not offering that for the purpose of changing or in any way modifying the stipulation, but merely giving a reason why certain agreements were not put in the stipulation in the exact words in which the witness' statement is made. [91]

The Court: Well, he can testify, put it in the record.

Mr. Jaureguy: You say he can put it in the record? The Court: Yes.

A. I take it that the stipulation does not state the intention of Dr. Deady to remarry and then to exercise his power under the will to his future wife, Mrs. Charlotte Deady. The reason I thought that was that I thought it was against public policy to put any such stipulation in the document and any contemplation of marriage. I thought it better to keep it out.

Mr. Jaureguy: Q. Now, you brought in conversations with Mr. Cookingham and Mr. Hindman had on this matter. Did Mr. Cookingham have anything to do with these negotiations? I mean in talking with Dr. Deady or with Mr. Dolph?

A. I can't say for certain whether he did or not. I know we had conferences. Whether he did carry on independent negotiations or conferences

(Testimony of Samuel B. Weinstein.)

with Dr. Deady I could not say. I know that he did transmit whatever I had concluded to the correspondent attorneys in New York, Webb, Petterson and Hadley.

Q. Was he present at any of these conversations had with Mr. Dolph or with Dr. Deady?

A. I don't think so.

Q. And did Mr. Hindman have any such conversations?

A. I think Mr. Hindman had a number of conversations with both of these parties, but I was not present at any of those. I carried them on independently of the others and [92] I reported in writing from time to time the progress that was being made.

Q. Yes. And Mr. Hindman is now dead?

A. Yes.

Mr. Jaureguy: That is all.

Recross Examination

By Mr. Maguire: Q. I don't know that I quite understand, Mr. Weinstein, what matter of public policy you thought was involved there.

A. Well, do you want me to answer that, Bob?

Q. Yes, I wish you would.

A. Well, Dr. Deady, at that time, if it is not known to you, had abandoned Amalie B. Deady. He had been at least interested in some other woman. It was that woman that he intended to marry after this divorce was obtained. I thought the whole

(Testimony of Samuel B. Weinstein.)

problem presented itself as a sort of a public policy that was not very dignified, to say the least, of his conduct at that time, and I did not want to insert it in the agreement.

Q. Well, now, what public policy and what didn't you want to insert in the agreement?

A. I did not want to say in the agreement that as consideration for this stipulation he agrees to marry this woman and that he will agree when he marries this woman to exercise his power of appointment under the last will and testament of his mother, Lucy A. H. Deady. I thought it was not proper and [93] should not be inserted, and left it open to him if he—you will notice that he agrees to exercise that power within one year. My information was that he intended to marry her very quickly after that.

Q. Well, why did you think it as against public policy?

A. Well, I consider it as against public policy as a matter of law.

Q. In what respect?

A. I think that a divorced person cannot marry within the state of Oregon within a period of time. My information was that he was about to marry pronto.

Q. You mean within the six-month period?

A. Yes.

Q. What would his contract or agreement that he would have with such wife as he should have to

(Testimony of Samuel B. Weinstein.)

make a binding agreement, what would there be against public policy in that?

A. Well, not at all. That is why it states that and nothing else.

Q. Did this contract state that his wife should do it?

A. Yes, he provides that the appointee should make that agreement.

Q. But you did not obtain any such promise from the prospective spouse?

A. No, I did not.

Q. And in submitting this agreement to the Court and having it [94] approved by the Court you did not tell the Court anything about this understanding or this relationship which you state is against public policy?

A. Well, if you want to know the truth about it, I so disclosed all of the facts to the Court.

Q. Though it was not in the stipulation?

A. All of the facts, including the conduct of Dr. Henderson Brooke Deady, who started the divorce suit.

Q. So that, though not in the stipulation, you told the Court about it anyway?

A. Exactly.

Mr. Maguire: That is all.

Further Redirect Examination

By Mr. Jaureguy: Q. Well, now, did Dr. Deady and Mr. Dolph agree with that conclusion, that his plans about marrying this woman and the aban-

(Testimony of Samuel B. Weinstein.)

donment and things should not be in the stipulation?

A. He insisted that it should not be inserted in there. He didn't want the world to know about his wife.

Q. Who is "he"?

A. I am talking about Dr. Henderson Deady.

Mr. Jaureguy: That is all.

Mr. Maguire: That is all, thank you. [95]

Wednesday, January 22, 1941, at 10:30 o'clock A. M., the trial of the above entitled cause was resumed, as follows:

The Court: You may proceed, Gentlemen:

Mr. Maguire: Plaintiff at this time renews his objection to the receipt of the Exhibit Defendants' Exhibit C and to the testimony of the witness Weinstein and moves that the testimony of the witness Weinstein with regard to investigations had, all of his testimony in regard to the conversations and negotiations, acts and things done and had with Henderson Brooke Deady and Chester V. Dolph be stricken from the record, on the grounds mentioned in our objections to the receipt of the testimony and exhibit; and the further ground that it is incompetent inasmuch as it tends to diminish or impeach the title or estate of Henderson Brooke Deady under the will, which could not be done by parol proof. Offhand, it would be a remarkable thing if oral declarations of anyone could change the nature and extent of an estate granted or given under a

(Testimony of Samuel B. Weinstein.)

deed or any other document which falls within those statutes requiring it to be in writing or to be authenticated, witnessed or otherwise in a particular way or manner, and that, as our research indicates, is the law, that it cannot be done. [97]

The Court: We are not making much progress with this. I am somewhat still in doubt, although, as I said last night, even after hearing the arguments, I am somewhat still in doubt as to the question of admissibility. Offhand I thought it was admissible, and I am rather inclined to view that way since. However, I think that I will have to change my procedure, because otherwise we are going to exhaust all this time that I have laid out for this case in argument, and I think that I will go ahead and take the testimony, all the testimony, under objection and I will rule when I come to make the decision. We are going to have the whole record in this case anyhow, because I have made up my mind all the testimony should go into the record whether [143] I admit it or exclude it, and I think that I will allow you to make your objections and take the testimony under the objection, and then when I decide the case I will rule *seriatim* on the objections, if that is not objectionable. If anyone wishes to object to that proceeding, why, I will try to consider these questions as we go along and rule definitely at this time .

Mr. Jaureguy: That is fine.

Mr. Maguire: Fine with us.

(Testimony of Samuel B. Weinstein.)

Mr. Jaureguy: Then we won't have to bring all these books back. What I say, we can rely on it that we are not going to argue on these questions as to the admissibility involved, because I gathered from his argument that there might be another bit of evidence on which—

The Court: (Interrupting) I think I would like to hear you as we go along, gentlemen.

Mr. Jaureguy: On the admissibility?

The Court: Yes, on the admissibility, but I think I won't make definite rulings at the time, but I think while we are here we ought to consider these questions together and raise and argue objections, but I think that I probably won't rule upon them and still receive them subject to the objections. I want to proceed very carefully in this case and not consider myself bound by rulings that I will subsequently sustain or that I won't want to sustain after a complete review of the authorities.

If there is nothing further, the court is in recess [144] until two o'clock.

(Whereupon, at 12:15 o'clock P. M., Wednesday, January 22, 1941, a recess was had until 2:00 P. M.)

Afternoon Session 2:08 P. M.

The Court: You may proceed, gentlemen.

Mr. Jaureguy: Call Mr. Hanover Deady.

HANOVER DEADY,

one of the defendants herein, was thereupon produced as a witness in behalf of defendants:

The Clerk: State your name, please.

A. Hanover Deady.

(The witness Hanover Deady was thereupon duly sworn and was examined and testified as follows:)

Direct Examination

By Mr. Jaureguy: Q. Your name is Hanover Deady? A. That is right.

Q. And you are one of the defendants in this case? A. Yes, sir.

Q. And how long have you lived in Portland?

A. I have been a resident here all my life.

Q. And how old are you?

A. I will be forty-nine this year; forty-eight now. [145]

Q. And what relation were you to Lucy A. H. Deady? A. Grandson.

Q. And your father's name was what?

A. Edward; Edward Nesbit Deady.

Q. And how many sons did your grandmother have? A. Three sons.

(Testimony of Hanover Deady.)

Q. And who were the other two?

A. Paul R. Deady and Henderson Brooke Deady.

Q. And your father died when?

A. Around about 1913 or '14.

Q. And when did Paul Deady die?

A. In 1920, in March.

Q. So that after March, 1920 the situation with respect to the descendents of Lucy A. H. Deady, as I understand it, was that she had one son, Henderson Brooke Deady, living?

A. That is right.

Q. And did you have any brothers or sisters?

A. I didn't hear the question.

Q. Did you have brothers or sisters?

A. I had one brother, Matthew.

Q. And, therefore, she had that one son and two grandsons?

A. That is right.

Q. Paul left no children?

A. Paul had no children, left no children.

Q. And did he leave a widow? [146]

A. Yes, he left a widow.

Q. And what was her name?

A. Marye Thompson Deady.

Q. That is (spelling) M-a-r-y-e?

A. That is right.

Q. Now, during your early youth and childhood did you ever have occasion to visit with your grandmother?

A. Oh, yes, I visited with her quite frequently.

(Testimony of Hanover Deady.)

Q. What would be the occasions for those visits?

A. Well, she was my grandmother. I went up to see her, enjoyed being with her.

Q. Now, are you married?

A. Yes.

Q. And when were you married?

A. June 1st, 1925.

Q. Was your grandmother acquainted with the lady that you later married?

A. Yes, she was.

Q. And how long had she known her?

A. Well, she knew her for quite a while, several years before we were married. I would say she knew her in 1920, at least, sometime before that.

Q. How long had you and your present wife been engaged before you were married?

A. I don't know how long we were engaged, but I knew her when [147] she was fourteen and I was seventeen. We went together, off and on, all the time.

Q. For the purpose of the record, the lady you married in 1925 is still your wife?

A. That is right.

Q. And that is the one that you say you have known ever since you were seventeen?

A. That is right.

Q. And what would you say as to whether you and she were engaged to be married before July, 1920?

A. Well, we always had that understanding.

Q. Well, that is what "that understanding" means?

A. Yes.

(Testimony of Hanover Deady.)

Q. Now, during the lifetime of your grandmother did she ever discuss with you her property?

Mr. Maguire: Object to the question because it is irrelevant and immaterial.

The Court: He may answer.

A. Yes, she did.

Mr. Jaureguy: Q. And during those discussions did she ever discuss what she desired to have done with that property?

Mr. Maguire: Object upon the ground as incompetent to prove any issue in this case.

The Court: Preliminary. I will permit the answer. A. Yes, she did. [148]

Mr. Jaureguy: Q. I wish you would just relate, giving us, as nearly as possible, the times and places, the conversations you had with her in which she discussed the matter of what she desired to be done with this property.

Mr. Maguire: We offer the same objection, that it is incompetent to prove the intent of the testator,—that has to be determined by the construction of the document which she executed as her last will and testament—and that it is incompetent, irrelevant and immaterial to any issue of this case, and—well, I will submit the objection first, this objection.

The Court: I do not understand that he has asked for anything except the times of the conversations.

Mr. Jaureguy: No, I asked him to give the conversations, giving the times as nearly as possible.

(Testimony of Hanover Deady.)

The Court: Well, do you wish to argue this? I may say, offhand, before that, that I think this line of testimony is entirely incompetent.

Mr. Jaureguy: While I want to follow your Honor's desires with respect to procedure, I do not want to have it excluded without argument, but if your Honor either takes it subject to reservations or otherwise, why, I will just follow whatever procedure your Honor wants. I would want to argue it. I would want to argue twenty minutes or such a matter.

The Court: Well, at this time I will take it subject to the objections. [149]

Mr. Jaureguy: And then at any time your Honor cares to have me argue it I will be glad to present that.

The Court: Yes.

Mr. Jaureguy: Q. Do you remember the question?

A. No, I would like to have it read.

(The last question was thereupon read.)

A. Well, she spoke of the property to me several times, several places.

Q. You say "the property". You are referring now to what property?

A. I am referring to the property involved in this case—that is the property at Broadway and Alder Street—but there was only—the time that she really explained the situation to me, explained her will to me, was shortly after Uncle Paul died

(Testimony of Hanover Deady.)

and after the time she had made her will. I was up to her apartment at the Alexandra Court, and she made the statement to me then that she had finally gotten her affairs settled and went into detailed explanation as to what she had done in drawing up her will.

Q. Well, prior to that time had she ever discussed her property and what her desires were with respect to the property?

A. Well, yes, she had told us, Matthew and I, especially myself, that—

Mr. Maguire: (Interrupting) Pardon me, just a moment. May it be understood that our objections to this testimony [150] relating to conversations with or statements made by Lucy A. H. Deady with regard to her property, how she intended to dispose of it, how she had disposed of it, and any of those matters, that our objection may run to all of these, without the necessity of interrupting each time?

The Court: Yes.

Mr. Jaureguy: Q. Just proceed.

A. She had spoken of the property in several instances before that time, saying and stating that we had nothing to worry about, referring to my brother and I, that she was going to leave us the property some day. Several times, even when Uncle Paul was alive, she spoke that way, but this was the only time that she had ever gone into—

(Testimony of Hanover Deady.)

Q. (Interrupting) Well, before you go into that, did she, in any of her conversations, ever discuss your Uncle Henderson? Before we come to that, was your Uncle Henderson living here at that time?

A. Oh, no, Uncle Henderson was in the East. He didn't come out here until—I don't mean to say he hadn't been here at some past time, but I mean to say he did not come out here until after Uncle Paul died.

Q. Well, do you know whether he was living apart from his wife at that time?

A. Did I know that?

Q. Yes. [151]

A. Oh, yes, I knew that.

Q. And did your grandmother know that?

A. Oh, yes, she knew about it.

Q. And did she ever say anything about it?

A. Oh, yes, she—

Mr. Maguire: (Interrupting) May we have the same objection, your Honor, as wholly incompetent, in regard to this matter? It seems to be a little foreign to the other matter.

The Court: You can have a general and continuing objection to all these statements of Lucy A. H. Deady.

Mr. Maguire: Very well. Thank you.

A. Yes, she spoke to me about the conditions or the situation back there, that Henderson wasn't living with his wife, and what the situation was entirely.

(Testimony of Hanover Deady.)

Mr. Jaureguy: Q. What did she say as to what the situation was?

A. Well, she seemed to be quite upset, or was quite upset, with the fact that Henderson was not living with his wife. That is about as much as I can remember of it.

Q. Now, did she ever, in any of these conversations about this property, did she ever say anything about what Henderson would get in the property, or what she desired him to have, or what she desired Paul to have?

A. She never told me what she desired Paul to have that I can remember, but she did tell me what she desired Henderson to have. That was after Paul had died, however. [152]

Q. And what did she say?

A. She told me, to my best recollection, in her apartment, that she had made out her will so that Matthew and I would come into the property some day, that she had left a certain portion of the property to Henderson if he had children, otherwise Matthew and I were to have all the property, and she then said, "However, Henderson will never have any children. He is a sick man and I know that he can't have any children." She also explained to me the reason that she put it that way, because—in the will that he should have the property if he had children, because he was her son and she thought it was only fair and right to put it that way in the will, but she never——

(Testimony of Hanover Deady.)

Q. Well, why, did she say?

A. Well, as I understood it, that she thought it was the proper thing to do, but she did not expect him to ever have any children. The fact of the matter is, she drew to my attention at that time that he was living apart from his wife; made the statement, too, that she hoped that his wife would never give him a divorce, that he expected to remarry and she hoped that he wouldn't remarry.

Q. She said that she hoped that he would remarry?

A. Hoped that Amalie would never give him a divorce so that he could remarry.

Q. Now, how far back would you say these conversations went in which she spoke about what she wanted done with this [153] property?

A. Well, I wouldn't be able to tell you, because she didn't really say anything definite to me while Uncle Paul was alive, except the general statement that we had nothing to worry about, that Matthew and I would come into the property some day, but this other—

Q. (Interrupting) Well, how far back did that go?

A. Well, I say I couldn't say definitely. Some time back.

Q. Some time back prior to Paul's death?

A. Oh, yes.

Q. What were the occasions on which she would make those remarks?

(Testimony of Hanover Deady.)

A. Well, I don't know. I just—we would go up there and see her, or I would go up there and see her alone. I think she enjoyed our company. I know I did hers.

Q. Well, would you be talking about finances, or what would you be talking about that would bring up the subject?

A. Oh, nothing particular. I—I can't account for it, except that she did make those statements.

Mr. Jaureguy: Now, up to this point it has been taken with objections, reserving objections to all of this, but I want to say that we are going onto another subject now, and if counsel wants it subject to the objection I think he had better make it.

The Court: Yes, he probably will.

Mr. Jaureguy: Q. Now, subsequent to the death—You remember [154] when your grandmother died?

A. Yes.

Q. And was Henderson here when she died?

A. No.

Q. Did he come here after she died?

A. He came out after she died—no, I beg your pardon; he was here before she died, about six or seven weeks before she died.

Q. And how long did he stay?

A. Well, he stayed at least a year.

Q. And was he here after that year? What I mean to say, you say he stayed at least a year. Did he go and stay away then, or was he back and forth?

A. Well, the length of time that he stayed here,

(Testimony of Hanover Deady.)

whether it was a year, or a year and six months, why, when he left he didn't come back, he was away indefinitely.

Q. Now, after she died, did you read the will?

A. Yes, sir; it was read to me and Uncle Henderson and Matthew in Joseph Simon's office.

Q. Now, after she died did you have any conversations with Henderson with respect to the distribution of the income from this property?

A. Yes, I did.

Q. And did you find occasion to consult a lawyer about it? A. Yes, I did.

Q. And whom did you consult? [155]

A. Ralph Wilbur.

Q. And was that shortly after your grandmother's death?

A. Well, it was within two or three months, I should judge, something like that.

Q. Now I wish you would state the conversations you had with Henderson with respect to the distribution of the income from this property.

The Court: I wish that you would amend that question, Mr. Jaureguy, in order to have it clear-cut, and have him give the time and place of the conversation, so far as he can remember, and persons present, so we can have it a little more clearly-cut as to what that was.

Mr. Jaureguy: Q. Now, you say you had such conversations. Do you recall the time and place where they took place?

(Testimony of Hanover Deady.)

A. Well, I don't recall the exact time, except that it was two or three months after Grandmother had passed away. I can't name any definite places, except one or two, because it was a kind of a carrying on of the conversation. For instance, up at his hotel, at one time, where he stayed, at the Weaver Hotel, and at the Hazelwood for lunch one time, and various places that way.

Q. And over what period of time did these conversations continue?

A. Well, the only way I can explain that is to tell what the conversations were about; what I mean to say is that he was [156] leading up to—

Mr. Maguire: (Interrupting) Now, just a moment. Now, if you are about to go into the question of the conversations I shall ask leave to submit an objection. We object to this upon the ground that it is wholly incompetent, not binding upon the plaintiff to this action, not binding upon plaintiff's predecessor, as to any estate or interest in the property, wholly hearsay, and therefore wholly incompetent, irrelevant and immaterial to any issue in this case, and not tending to prove or disprove any issue in the case.

The Court: The Court will reserve ruling and take the testimony.

Mr. Jaureguy: Now, inasfar as it is possible—

Mr. Maguire: (Interrupting) Pardon me, just a moment—and may it be understood that as to

(Testimony of Hanover Deady.)

these conversations with Henderson Brooke Deady our objection may run to each and every question and answer without the necessity of taking up the time to repeat it each time?

The Court: You may have a general and continuing objection to all declarations by Henderson Brooke Deady.

Mr. Maguire: Thank you, sir.

The Court: Proceed.

Mr. Jaureguy: Q. Insofar as it is possible, we want you to state the time and place and persons present, and any other circumstances that will serve to identify the conversations. [157] Now, with that admonition, I wish you would state what these conversations were, what he said, and the occasions that gave rise to these conversations.

A. Well, that is pretty hard to do, it was quite sometime ago, but, as I stated before, that I saw him at various places,—I used to go out for a ride with him occasionally, I saw him at his hotel, and ate lunch with him quite frequently, and it was at those places that he would talk to me about the property and what he wanted done, and at these various places he kind of lead up to finally what he did ask me for, that he needed some money, wanted some money to live off of, he had no other means to live, and he said he had spoken to Joseph Simon about getting some money and Mr. Simon said that it would be all right if he got the consent of Matthew and I. And he explained to me that the reason he

(Testimony of Hanover Deady.)

wanted the money was because he couldn't get the money at the present time, and the reason he wanted us to consent to get the money was because he couldn't get any money at the present time, inasmuch as under the will the moneys had to be paid out for a sinking fund and inheritance taxes, and so forth, was what they all were, that he had to wait, unless he got Matthew's and my consent to that, to get some money. I—so I said that I went down to Mr. Simon's office and asked him about it—

Q. (Interrupting) No, but I want to ask you whether he put up any arguments why you should give the consent that he could [158] have the money, even though under the will he was not entitled to it?

Mr. Maguire: Why, just a moment—the witness has not yet so testified.

The Court: Yes, I think maybe the witness had better testify.

Mr. Jaureguy: Well, he just related the obstacles to getting money under the will at the outset.

The Court: Well, I would just as soon let the witness testify.

Mr. Jaureguy: That is what I want to.

The Court: Let him relate the different conversations there were, the times and circumstances, so we will see his testimony in the record.

Mr. Jaureguy: All right.

A. Yes, Henderson did put up the proposition to me that he was a sick man, that he needed the money, and, as I explained before, that, why, he

(Testimony of Hanover Deady.)

couldn't get it unless he could get Matthew's and my consent, and he also expressed that inasmuch as Matthew and I were coming into the property some day ourselves, why, he thought it was only fair that he should get something to live off of, and—

Q. (Interrupting) Well, did he elaborate on why you were coming into the property?

A. Oh, yes, he said that "I can't come into the property unless [159] I have children, as you know, and I will never have any children, because I am a sick man, I can't have children."

Q. Now, did you make any agreement with him whereby he was to get income?

A. Yes, I signed a stipulation.

Mr. Jaureguy: I wonder if we could have the pre-trial exhibits. Handing you Defendants' Pre-Trial Exhibits I and J, I wish you would just look at those and explain what they are.

Mr. Maguire: They speak for themselves, do they not? I have no objection to the witness identifying the documents as to the signatures or otherwise, although, as I understood it, our pre-trial order covered the matter of identification.

Mr. Jaureguy: I will withdraw the question and ask another one, and then you can object to that.

Mr. Maguire: Very well.

Mr. Jaureguy: Q. Are those the stipulations that you referred to a few moments ago that you signed?

A. That is correct.

(Testimony of Hanover Deady.)

Q. Now, those are dated December, 1923, and, as I recall, October, 1924.

A. That is right.

Mr. Jaureguy: I offer those two stipulations in evidence.

Mr. Maguire: We now move that all the testimony of the witness heretofore given with regard to conversations between himself and Henderson Brooke Deady relating to and which [160] culminated in these stipulations be stricken upon the ground that it, being the preliminaries to an agreement, they have merged, the agreement takes their place, and they are not competent.

The Court: You are moving to strike out the previous testimony and then objecting to the exhibits, I take it?

Mr. Maguire: Well, I am moving first as to the previous testimony. I am not yet objecting to the exhibits. I will do that as soon as your Honor has ruled on the—

The Court: (Interrupting) The motion to strike is presently denied. The testimony will remain in the record, subject to the objection. The documents are received, subject to the objection.

Mr. Maguire: Well, I have not yet made an objection to the exhibits. My objection to the exhibits in question is that they are wholly incompetent and irrelevant to prove any issue in the case, to prove testamentary intent of Lucy A. H. Deady,

(Testimony of Hanover Deady.)

or to bind in any way Henderson Brooke Deady, or to bind in any way the plaintiff in this action, wholly incompetent to vary, diminish or impeach the title of Henderson Brooke Deady under the will of Lucy A. H. Deady.

The Court: Received in the record, subject to the objection. The Court will subsequently rule as to whether they are in evidence or received under the rule.

(Certified phostatic copy of stipulation, Lucy A. H. Deady estate, dated December 18, 1923, [161] executed by Joseph Simon and Henderson Brooke Deady, Executors, and Henderson Brooke Deady, Hanover Deady, Mary E. Deady, Matthew Edward Deady and Marye Thompson Deady, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit I, was thereupon marked received subject to objection, ruling reserved; and

Certified phostatic copy of stipulation, Lucy A. H. Deady Estate, dated October—, 1924, executed by Hanover Deady, Matthew E. Deady, Mary E. Deady; Joseph Simon, Henderson Brooke Deady, Executors; Henderson Brooke Deady, and Marye T. Deady, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit J, was marked received subject to objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANT'S PRE-TRIAL EXHIBIT I

In the Circuit Court of the State of Oregon
for the County of Multnomah
Probate Department.

In the Matter of the Estate of LUCY A. H.
DEADY, Deceased.

STIPULATION

Whereas the last will and testament of said deceased, now being probated in the above proceedings, makes provision for the payment monthly of certain sums of money to Henderson Brooke Deady, Matthew Edward Deady, Hanover Deady, Mary E. Deady and Marye Thompson Deady; and

Whereas a controversy exists as to whether or not the estate of said deceased shall be distributed as by said will directed and as to the ownership of the real estate known as Lot One (1) in Block Two Hundred and Twelve (212) in the City of Portland, and included within the terms of said will; and

Whereas it is the desire of all of the parties to this stipulation that monthly payments may be made by the Executors of said estate in their discretion out of the funds of said estate during the pendency and until the determination of such controversy;

Now therefore it is hereby mutually stipulated, understood and agreed by and between the parties hereto that the said Executors may in their discretion beginning as of date of December 1, 1923, pay,

(Testimony of Hanover Deady.)

of the sums of money directed by said will to be paid to the beneficiaries hereinafter named and each of them, and out of the funds of said estate, to Henderson Brooke Deady \$300.00 per month, Matthew Edward Deady \$100.00 per month, Hanover Deady \$100.00 per month, Mary E. Deady \$150.00 per month and to Marye Thompson Deady \$75.00 per month; without prejudice to the right of said parties or any of them in said controversy or in or to said estate, or any part thereof, and without prejudice to the contentions made, or to be made, by any of the parties as to the title of said Lot One (1) in Block Two Hundred and Twelve (212) City of Portland, and without prejudice to the rights of the Executors of said estate in the premises.

Dated at Portland, Oregon, this 18th day of December, 1923.

JOSEPH SIMON

HENDERSON BROOKE DEADY

Executors

HENDERSON BROOKE DEADY

HANOVER DEADY

MARY E. DEADY

MATTHEW EDWARD DEADY

MARYE THOMPSON DEADY

[Endorsed]: Filed Dec. 19, 1923 Jos. W. Beveridge, Clerk F. O. McGrew, Deputy.

(Testimony of Hanover Deady.)

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Stipulation in the Matter of the Estate of Lucy A. H. Deady, Deceased, Est. No. 22735 has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Stipulation as the same appears on file in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal) A. A. BAILEY,
County Clerk.

By E. L. FERGUSON
Deputy.

[Endorsed]: Filed Feb. 21, 1942.

(Testimony of Hanover Deady.)

DEFENDANT'S PRE-TRIAL EXHIBIT J

In the Circuit Court of the State of Oregon
for the County of Multnomah.

Probate Department.

In the Matter of the Estate of LUCY A. H.
Deady, Deceased.

STIPULATION

It is stipulated and agreed by the parties to that certain agreement of date of December 18, 1923, covering the payment to the beneficiaries under the will of Lucy A. H. Deady, that beginning November 1st, 1924, there shall be paid to Henderson Brooke Deady the sum of Four Hundred Dollars (\$400.00) per month instead of Three Hundred Dollars (\$300.00) per month as heretofore; without prejudice to the rights of the said parties or any of them in said controversy or to said estate or any part thereof, and without prejudice to the contentions made, or to be made, by any of the parties as to the title of the said Lot One (1) in Block Two Hundred Twelve (212) City of Portland, Oregon, and without prejudice to the rights of the Executors of the estate in the premises.

Dated at Portland, Oregon this day of October, 1924.

HANOVER DEADY

MATTHEW E. DEADY

MARY E. DEADY

JOSEPH SIMON

HENDERSON BROOKE DEADY

Executors

[Endorsed]: Filed Feb. 3 1925 Jos. W. Beveridge,
Clerk O. C. Thornton, Deputy

(Testimony of Hanover Deady.)

I hereby agree and enter into the above stipulation with the provision that said additional sum of One Hundred Dollars (\$100) per month shall be made to Henderson Brooke Deady by the executors, each month. The said One Hundred Dollars (\$100) to be paid by drawing a check in his behalf for Ninety Dollars (\$90) and in my behalf for the sum of Ten Dollars (\$10).

MARY T. DEADY

Henderson Brooke Deady

I agree to the above.

HENDERSON BROOKE DEADY

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Stipulation in the Matter of the Estate of Lucy A. H. Deady, Deceased, Est. No. 22735 has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Stip-

(Testimony of Hanover Deady.)

ulation as the same appears on file in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal) A. A. BAILEY,
County Clerk.

By E. L. FERGUSON,
Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Q. Now, the second paragraph of the Pre-Trial Exhibit I, which is dated the 18th day of December, 1923, reads as follows:

“Whereas a controversy exists as to whether or not the estate of said deceased shall be distributed as by said will directed and as to the ownership of the real estate known as Lot One (1) in Block Two Hundred and Twelve (212) in the City of Portland, and included within the terms of said will;”

What was the controversy with respect to that real property that was referred to there? [162]

Mr. Maguire: We object to that as being wholly incompetent and might add terms to an agreement, and the agreement speaks for itself and cannot be varied by hearsay testimony or cannot be altered or added to.

(Testimony of Hanover Deady.)

Mr. Jaureguy: It isn't being altered. This controversy is referred to as a controversy, and I want to have him explain what that controversy was. There is a recital here that there was a controversy.

Mr. Maguire: Only hearsay.

The Court: He may answer. The testimony will be received, subject to the objection.

A. The controversy was as to whether Henderson should have any money at the present time and let all these other payments that were due under the will to be deferred until he got some money.

Mr. Jaureguy: Q. Well, that is the first part, where it says the controversy is as to whether the estate should be distributed. It also says "and as to the ownership of the real estate." Was there any controversy at that time as to the ownership of the real estate?

A. Not to my knowledge.

Q. Had Marye Thompson Deady made any claim?

A. Oh, yes, I beg your pardon, she had.

Mr. Maguire: I want to object to that as purely leading. The question was as to whether there was any controversy. [163]

A. Oh, yes, there was a controversy.

Mr. Maguire: I don't want to let counsel testify. Let the witness be bound by what is brought out.

The Court: I think there is something to that, Mr. Jaureguy. However, the witness has answered

(Testimony of Hanover Deady.)

and I will leave it in the record, but I think that this witness is wholly capable of testifying without having his attention directed to what counsel say. I am not impugning counsel's motives or counsel's ethics in the matter, but I think that this should be tried out on the memory of the witness.

Mr. Jaureguy: Q. Had any person named in the will of Lucy A. H. Deady made any claim with respect to this real property upon or about the time of the death of your grandmother?

A. Yes.

Q. And who was that?

A. Marye Thompson Deady, Uncle Paul's widow.

Q. When did you first hear of that claim?

Mr. Maguire: May we have an objection to any matter of the claim of Marye Thompson Deady or any conversations in regard to it, on the ground that they are wholly irrelevant and immaterial and not competent to prove any issue in this case.

The Court: The testimony is received, subject to the objection. Go ahead.

Mr. Jaureguy: Q. When did you first hear of that claim?

A. Well, shortly after Grandmother died. Marye Thompson Deady [164] came up here from California and made a claim against the estate for what she thought or understood was probably Paul's share of the estate.

Q. And whom did she talk to? You say she came

(Testimony of Hanover Deady.)

up and talked. A. Talked to Joseph Simon.

Q. And whom else, if anybody, that you know of?

A. To Uncle Henderson. Talked to my mother.

Mr. Maguire: Now you are certainly departing from our rules of evidence. Conversations alleged to be had by Marye Thompson Deady with Mr. Simon, Senator Simon, or with this witness' mother certainly aren't competent, and this is purely hearsay as to this witness and as to all parties in this case.

The Court: I think that you are correct, and I will sustain the objection and strike that testimony out, unless the witness testifies that he knew something about it.

Mr. Freed: He had just asked him, your Honor, whether they had a conversation. That was the only question, and I assume that it could not be hearsay. If it was it would be inadmissible.

The Court: Yes, I think it is fairly obvious that there may be some hearsay involved in the answer. That is why I am striking it.

Mr. Jaureguay: Q. Now, did you and Henderson have any conversations with respect to that claim? A. Yes. [165]

Q. And you say that he talked to your mother about it?

Mr. Maguire: There has as yet been no such testimony, that Henderson talked to the mother about it.

(Testimony of Hanover Deady.)

Mr. Jaureguy: He did, too; he just said that a couple of minutes ago.

The Court: Yes, and I struck it from the record.

Mr. Jaureguy: Beg your pardon?

The Court: And I struck it from the record.

Mr. Jaureguy: Oh, you struck it from the record?

The Court: Yes, I struck it from the record, because, I said, it was very obvious, unless he testified to something more, that there was hearsay involved in that answer.

Mr. Jaureguy: Oh, I beg your Honor's pardon. I get the point now.

Q. Were you ever present when there was any conversation between your Uncle Henderson and your stepmother with respect to this claim of Marye Thompson Deady? A. Yes, I was there.

Q. And where did that conversation take place?

A. At our old home out on the Peninsula, out on Curtis Avenue.

Q. Now to go back a moment, that was your stepmother? A. Yes, that was my stepmother.

Q. And your mother died when?

A. Shortly after I was born.

Q. And you have no recollection of her? [166]

A. No.

Q. And your father remarried, to your stepmother, when? A. I don't remember.

Q. Do you have any recollection?

(Testimony of Hanover Deady.)

A. No, I don't remember. I didn't know she was my stepmother until I was eighteen, I know that.

Q. In other words, it was when you were very young? A. Yes.

Q. Now, what was this conversation that you say took place between Henderson and your mother regarding this claim?

Mr. Maguire: Upon the same grounds and for the same reasons which we have heretofore urged to your Honor, we object to the testimony of conversations between Henderson Brooke Deady and Mary E. Deady, the stepmother of this witness, even though the witness were present.

The Court: Received, subject to the objection.

A. Henderson came out to the house to see mother, explaining to her that Marye was making claims against the estate and wanted Mother to do what she could, or, I might say, take sides, explaining to her at the time that if Marye should prevail in her contention that we would be only subject to getting a third of the estate.

Mr. Jaureguy: Q. And did he explain why that was?

A. Yes, he explained that if she won her contention, why, the same state of facts would leave us in the same position. [167]

Q. And what did he say would be the share you would get if you defeated Marye Thompson Deady?

(Testimony of Hanover Deady.)

A. Well, that was it, that we would only have a third of the estate.

Q. No, I say, if you defeated Marye Thompson Deady?

A. Oh, then we would have—we would take under Grandmother's will, as we always understood it to be, that Matthew and I should have the property if Henderson died without issue.

Q. Did he say that to your mother?

A. Oh, yes, very emphatic about it.

The Court: I want to suggest again, Mr. Jaureguy, that I want this witness to tell his memory of the conversation, without suggestion from counsel. He knows what the conversation was.

Mr. Jaureguy: What is that?

The Court: I say, he knows what the conversation was, and I want him to relate his memory of the conversation, have him give the complete conversation, and let it go at that.

Mr. Jaureguy: Q. Now, subsequent to that time did Marye Thompson Deady file her complaint—or, I will show you here Defendants' Pre-Trial Exhibit D, which is an amended complaint, and ask you if the original of that document or a copy of that document came to your attention about the time it was filed?

A. Well, I am going to answer that this way, that I don't remember exactly whether this suit had been filed when Henderson [168] was out there,

(Testimony of Hanover Deady.)

but it was shortly close to it. I know there had been a claim made by Marye against the estate. My best recollection is that a suit had been filed.

Mr. Jaureguy: We offer that Pre-Trial Exhibit D in evidence.

Mr. Maguire: To the receipt of this exhibit the plaintiff objects on the ground and for the reason that it is wholly incompetent to prove or disprove any issue of this case, to prove or disprove the intent of the testator, or to affect any right, title or interest of the estate of Henderson Brooke Deady in the property, or that of the plaintiff, or to diminish or change the nature of Henderson Brooke Deady's estate under his will.

The Court: Received, subject to the objection and subsequent ruling of the Court.

(Certified photostatic copy of Amended Complaint, Marye T. Deady v. Henderson Brooke Deady, et al, so offered, having previously been marked as Defendants' Pre-Trial Exhibit D, was thereupon marked received, subject to objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANT'S PRE-TRIAL EXHIBIT D

In the Circuit Court of the State of Oregon for the
County of Multnomah.

MARYE T. DEADY,

Plaintiff,

vs.

HENDERSON BROOKE DEADY, MARY E.
DEADY, MATHEW DEADY, HANOVER
DEADY, and HENDERSON BROOKE
DEADY and JOSEPH SIMON as executors
of the estate of LUCY A. H. DEADY, de-
ceased,

Defendants.

AMENDED COMPLAINT

Plaintiff for cause of suit against the defendants,
complains and alleges in this her amended com-
plaint:

I.

That on or about the 24th day of March, 1893,
Mathew P. Deady was the owner and in possession
of certain real property, more particularly de-
scribed as Lot One (1), Block Two Hundred and
Twelve (212), Portland, appraised at Thirty Thou-
sand (\$30,000.00) Dollars; Lots Sixteen (16) and
Seventeen (17), Block Eight (8), Goldsmith's addi-
tion to the City of Portland, appraised at Five
Thousand (\$5,000.00) Dollars; also Block Three

(Testimony of Hanover Deady.)

(3), Hawthorne Place, East Portland, all situate in the City of Portland, Multnomah County, State of Oregon.

II.

That the said Mathew P. Deady died testate in Multnomah County, Oregon, on the 24th day of March, 1893, having prior to his death duly made, executed and published his last will and testament, hereinafter referred to, and that the only heirs at law of the said decedent were his wife, Lucy A. H. Deady, and the three sons of the said Mathew P. Deady and Lucy A. H. Deady, namely: Henderson Brooke Deady, Edward N. Deady and Paul R. Deady, all of whom were over the age of twenty-one years at the date of the death of their father, Mathew P. Deady, and that his said wife and sons were the only legatees, devisees and beneficiaries under the last will and testament of said deceased.

III.

That under and by the terms of said last will and testament of said Mathew P. Deady, his property, both real and personal, was bequeathed and devised in the following manner, to-wit: all personal property of which the testator died seized or possessed and the right to the use and enjoyment of the rents and profits of any and all real property for the term of her natural life were bequeathed to the testator's wife, Lucy A. H. Deady; and to each of his three sons above named was de-

(Testimony of Hanover Deady.)

vised, in fee simple, an undivided one-third of any and all real property of which the said testator, Mathew P. Deady, died seized or possessed, subject only to said life estate of his said wife, Lucy A. H. Deady.

IV.

That the said last will and testament of the said Mathew P. Deady, deceased, was duly and regularly probated in the County Court of Multnomah County, Oregon, and that on or about the 3rd day of January, 1894, the executors of the estate of the said deceased filed their final account and report and were duly and regularly discharged by the order of the Court of said County, and that it was by said court ordered, adjudged and decreed that the said Lucy A. H. Deady was entitled to the possession of all the personal property of which the said Mathew P. Deady was possessed at the time of his death, and in addition thereto to the right to the use and rents, for her natural life, of any and all real property of which the said testator died seized and possessed; and it was further by said court decreed that the said three sons of the said deceased were the owners of and each was entitled to an undivided one-third interest in and to all of the real property of which the said Mathew P. Deady died seized or possessed, subject only to the aforesaid life estate, and that by virtue of said bequest and devise said Lucy A. H. Deady went into pos-

(Testimony of Hanover Deady.)

session of the real property of said decedent, and at all times since the death of said deceased had and enjoyed the rents, issues and profits thereof.

V.

That the plaintiff herein was lawfully married to said Paul R. Deady on February 2, 1892, and that at all the times herein mentioned, prior to his death, plaintiff was the wife of said Paul R. Deady and is now his widow, the said Paul R. Deady having died intestate in Multnomah County, Oregon, on the 28th day of March, 1920; that there was no issue of said marriage between plaintiff and the said Paul R. Deady, and plaintiff is the sole heir at law of her said husband.

VI.

That on or about the 1st day of January, 1894, the said Lucy A. H. Deady appointed one Thomas Scott Brooke as her agent, and said Thomas Scott Brooke, sometimes called T. S. Brooke, was from said date at all of the times herein mentioned, the duly appointed and authorized agent of the said Lucy A. H. Deady, and in his capacity as such was authorized to and did transact business for and on behalf of said Lucy A. H. Deady, and particularly matters concerning said real property, until his death in the year 1915.

(Testimony of Hanover Deady.)

VII.

That the said Lucy A. H. Deady was, in the year 1893, about fifty-eight years of age, and that after the death of her said husband, the said Lucy A. H. Deady had very little income or means of support and was dependent upon the rents from the real property hereinbefore referred to, which were very meager and inadequate; and that because of the advanced age of the said Lucy A. H. Deady and her lack of sources of income other than the rent received from said Lot 1, Block 212, the said Lucy A. H. Deady and her said agent were desirous of increasing the income derived from the said Lot, and with this end and purpose in view, the said Lucy A. H. Deady and her agent, T. S. Brooke, proposed to increase the rents derived from the said property by constructing a large building on the said Lot, but that inasmuch as the said Lucy A. H. Deady did not have any or sufficient funds with which to construct the building contemplated, and neither she nor her said agent were able to procure funds or credit from any source for such purpose, it was conceived and proposed that in order to secure funds necessary to construct the said building, that the said lot be offered as security and a mortgage given thereon to the person, firm or corporation advancing the funds with which to construct the building contemplated.

(Testimony of Hanover Deady.)

VIII.

That the proposed construction of a building on the said property, and the ways, means and methods of obtaining money for financing the erection of such building were discussed by the parties interested for a considerable period, and that during the years 1894, 1895 and 1896 there were many family conferences held regarding the proposed scheme, and that during said period the said T. S. Brooke, acting as agent for the said Lucy A. H. Deady, attempted to procure loans from various sources, offering as security a mortgage upon said Lot, to be executed by the said Lucy A. H. Deady, but was unsuccessful for the reason that the said Lucy A. H. Deady was entitled only to the use and possession of said Lot for the term of her natural life, and was not the owner of the property, and further because of the fact that the said Henderson Brooke Deady, Edward N. Deady and Paul R. Deady, who were the actual owners of said Lot, were irresponsible financially and were incapable of caring for themselves and their interests in the said property and were known to be rapidly dissipating their assets, and that the said Paul R. Deady had, during the year 1894, placed a mortgage for the sum of two thousand dollars upon his undivided one-third interest in the said Lot, and the said Edward N. Deady had placed a mortgage for two thousand five hundred dollars upon his un-

(Testimony of Hanover Deady.)

divided one-third interest in the said Lot, and the said Lucy A. H. Deady and the said T. S. Brooke, her agent, were unable to find anyone able and willing to lend money secured by a mortgage upon the said premises, unless the mortgagee could be assured that the security would not be rendered valueless or uncertain by the acts of the said Henderson Brooke Deady, Edward N. Deady and Paul R. Deady; and that in order to procure a loan on the said premises for the purpose of constructing said building, and in order to give security satisfactory to a mortgagee, it was proposed and urged by the said Lucy A. H. Deady and the said T. S. Brooke, acting as her agent, that Henderson Brooke Deady, Edward N. Deady and wife and Paul R. Deady and this plaintiff execute and deliver to the said Lucy A. H. Deady, deeds conveying to the said Lucy A. H. Deady the legal title to said Lot for the sole and only purpose of enabling the said Lucy A. H. Deady and the said T. S. Brooke, her agent, to mortgage the said premises, and by so doing to secure funds to construct said building upon said Lot.

IX.

That the plaintiff herein and said Paul R. Deady refused and declined to execute a conveyance of any nature whatsoever which might divest the plaintiff or her husband of their interest in the said Lot, for the reason that it was the intention and

(Testimony of Hanover Deady.)

request of said Lucy A. H. Deady and her said agent, that no consideration be paid to the said Paul R. Deady or this plaintiff therefor, but that said conveyance of their undivided one-third interest in the said premises by the said Paul R. Deady and plaintiff be made and delivered without consideration, said conveyance to be for the sole purpose of placing legal title to the said Lot in the name of Lucy A. H. Deady, so as to enable her to offer a mortgage on said Lot to be executed and delivered as security; that the said Lucy A. H. Deady and her said agent, after repeated statements and representations to plaintiff and said Paul R. Deady that to increase the income and value of said Lot it would be necessary to construct a building thereon and that in order so to do it would be necessary to offer the same as security for a loan thereon, and after the said Lucy A. H. Deady and her said agent had persuaded the said Paul R. Deady that the only purpose and effect of the proposed deed from himself and his wife, the plaintiff herein, would be to place the legal title to said Lot in the said Lucy A. H. Deady during the life of said Lucy A. H. Deady, and that the equitable title should remain in and that the legal title would revert to him at the termination of said life estate of said Lucy A. H. Deady, the said Paul R. Deady insisted and demanded that the plaintiff sign such conveyance, at all times re-assuring plaintiff that

(Testimony of Hanover Deady.)

the said one-third interest of said Paul R. Deady and the plaintiff would be fully protected and that the legal, as well as the equitable title would be vested in them at the death of said Lucy A. H. Deady.

X.

That the plaintiff and said Paul R. Deady had, at all times, implicit faith and confidence in the said Lucy A. H. Deady and the said T. S. Brooke, her agent, and plaintiff and the said Paul R. Deady by reason thereof and relying upon the representations and assurances of the said Lucy A. H. Deady and said T. S. Brooke that the proposed transfer was but a nominal one and that plaintiff's and her said husband's interests and property rights would not only be fully protected, but would also be enhanced in value by the construction of said building, and that the legal title to said Lot would return to them upon the death of the said Lucy A. H. Deady as fully and completely as though the said conveyance to the said Lucy A. H. Deady had not been executed, and plaintiff and said Paul Deady believing such to be the only purpose and effect of said conveyance, this plaintiff and her said husband were induced to and did sign a certain deed dated January 20th, 1897, recorded in Book 236, page 362, Deed Records of the County of Multnomah, State of Oregon, whereby legal title to the said property was placed in the name of Lucy A. H. Deady.

(Testimony of Hanover Deady.)

XI.

That the said deed was signed and delivered by the plaintiff and her husband, the said Paul R. Deady, wholly without consideration and with the intent that the equitable title to the property should not be transferred, and said deed was accepted by the said Lucy A. H. Deady with that understanding and on that condition, and that the said Lucy A. H. Deady received the said conveyance as trustee for the plaintiff and her said husband, and covenanted and agreed with the plaintiff and her husband that the said property was to be held in her name as legal owner for the sole purpose of giving security for the proposed loan and mortgage, and that the legal title to the said property would be returned to the plaintiff and her husband upon the death of the said Lucy A. H. Deady.

XII.

That immediately after the execution of the deed aforesaid, the said Lucy A. H. Deady secured a loan of the sum of Eleven Thousand Dollars (\$11,000.00) from the Oregon Mortgage Company, giving as security to the said Oregon Mortgage Company, mortgagee, a mortgage upon the said Lot 1, Block 212, which mortgage was recorded on January 20, 1897, in Book 174 on page 292 thereof, Mortgage Records of Multnomah County, Oregon, and that immediately thereafter, pur-

(Testimony of Hanover Deady.)

suant to the terms of her trust, the said Lucy A. H. Deady and the said T. S. Brooke, her agent, commenced the construction of a large building upon the said premises.

XIII.

That at the time of the making and delivery of the deed aforesaid and for some time prior thereto, the plaintiff herein and her husband, the said Paul R. Deady, were in straitened circumstances financially and had difficulty in obtaining a livelihood, and that subsequent thereto their financial condition became such as to necessitate plaintiff's relying upon her own relatives for support and maintenance, so that at the death of the said Paul R. Deady, the plaintiff's husband, on March 28, 1920, plaintiff and her said husband were, of necessity, living apart.

XIV.

That prior to March 28, 1920, the said Lucy A. H. Deady made and executed her will, but that after the death of the said Paul R. Deady, the said Lucy A. H. Deady, pretending to believe that the plaintiff and the said Paul R. Deady were no longer husband and wife, made and signed an instrument on July 29, 1920, which she declared to be her last will and testament.

XV.

That the said Lucy A. H. Deady died in Multnomah County, Oregon, on the 29th day of August,

(Testimony of Hanover Deady.)

1923, and that the said Will, dated July 29th, 1920, was admitted to probate on the 5th day of September, 1923, in the Circuit Court of Multnomah County, Oregon.

XVI.

That, by the terms of the said Will, the said Lucy A. H. Deady attempted to appropriate and devise the said Lot 1, Block 212, as though both the legal and equitable title to said property were vested in the said Lucy A. H. Deady, and utterly disregarding and ignoring the rights of said Paul R. Deady and the plaintiff as the widow and sole heir at law of the said Paul R. Deady, deceased, to an undivided one-third interest in fee simple, in the said Lot, and in violation of her trust and for the purpose and with the intent of defrauding and depriving plaintiff of the interest in said property to which she was and is justly and equitably entitled by reason of her being the sole heir at law of said Paul R. Deady, wrongfully and surreptitiously attempted to devise plaintiff's said one-third interest in said Lot to persons other than plaintiff, to plaintiff's great loss and damage.

XVII.

That said undivided one-third of said Lot is now of the value of more than One Hundred Thousand (\$100,000.00) Dollars.

(Testimony of Hanover Deady.)

XVIII.

That it is inequitable and unjust to permit the said Lucy A. H. Deady and her executors and personal representatives to repudiate her said trust and to ignore plaintiff's interest in the said Lot, or to allow said property to be considered the property of Lucy A. H. Deady, or to be devised by her, under the terms of her last will and testament, to the exclusion of plaintiff from plaintiff's right, title and interest therein.

XVIX.

That defendants, Henderson Brooke Deady and Joseph Simon are the duly qualified and acting executors of the estate of Lucy A. H. Deady, deceased, and as such are in possession and control of the said property, and said executors have had and received the rents, issues and profits thereof since the death of the said Lucy A. H. Deady, and that defendants, Henderson Brooke Deady, Mary E. Deady, Mathew Deady, and Hanover Deady claim interests in said property adverse to the claim of this plaintiff.

XX.

That the plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays for judgment and decree herein, as follows:

(Testimony of Hanover Deady.)

1. That It Be Decreed that the legal title to the undivided one third interest in Lot One (1) of Block two hundred and twelve (212) of the City of Portland, Multnomah County, Oregon, devised by the said Matthew P. Deady to the said Paul R. Deady, was conveyed by the said Paul R. Deady and plaintiff herein, to said Lucy A. H. Deady in trust only, and that the equitable title therein remained in the grantors in said deed;

2. That It Be Decreed that plaintiff, as the only heir at law of the said Paul R. Deady, is the owner in fee simple, of said undivided one third interest in said lot;

3. That the said Executors of the Estate of said Lucy A. H. Deady, deceased, be required to execute and deliver to plaintiff, a good and sufficient deed of conveyance, conveying to her the title in fee, to the said undivided one third interest in and to said lot; and in default thereof, that it be decreed that this decree of the court shall stand for and in place of such deed and that the same shall constitute a conveyance to plaintiff, of said undivided one third interest in said lot.

4. That defendants account to this plaintiff for all revenues received by them, or either of them, from the said undivided one third interest in said lot, since the death of the said Lucy A. H. Deady; and that plaintiff have judgment against said defendants for the amount so received by them;

(Testimony of Hanover Deady.)

5. That defendants and all persons claiming any interest through them, in said undivided one third interest in said lot, be forever barred of any estate, right, title or interest therein;

6. That plaintiff have and recover her costs and disbursements incurred in this suit;

7. That plaintiff have such other and further relief herein, as to the court may seem just and equitable.

GRIFFITH, PECK & COKE

JOHN S. COKE,

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah—ss.

I, Marye T. Deady being first duly sworn, depose and say that I am the Plaintiff in the above entitled Cause; and that the foregoing Amended Complaint is true, as I verily believe.

MARYE T. DEADY.

Subscribed and sworn to before me this 8th day of July, 1925.

(Seal) A. G. BARRY,

Notary Public for the State of Oregon.

My commission expires 6/24/27.

(Testimony of Hanover Deady.)

State of Oregon,

County of Multnomah—ss.

I, John S. Coke, one of attorneys for Plaintiff in the within entitled Cause, do hereby certify that the foregoing Amended Complaint is in my opinion well founded in law.

State of Oregon,

County of Multnomah—ss:

Due, timely and legal service by copy admitted at Portland, Oregon, this 8th day of July, 1925.

SIMON, GEARIN,

HUMPHREYS & FREED,

Attorneys for Defendants.

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon for the County of Multnomah, a Court of Record, do hereby certify that the foregoing copy of Amended Complaint (Marye T. Deady, Plaintiff, vs. Henderson Brooke Deady, et al, Defendants) No. K-8897 has been compared by me with the original and that it is a correct transcript therefrom, and of the whole of such original Amended Complaint as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my

(Testimony of Hanover Deady.)

hand and affixed the seal of said court, this 6th day of May A. D. 1940.

A. A. BAILEY,

County Clerk.

(Seal) MARY DUNKIN,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Now I hand you Pre-Trial Exhibit E—or, I offer in evidence Pre-Trial Exhibit E.

Mr. Maguire: To the receipt of this exhibit the plaintiff offers the same objection, on the same grounds and reasons offered as to the previous exhibit. [169]

The Court: Received in the record, subject to the objection and subsequent ruling of the Court.

(Photostatic copy of compromise agreement between Marye Thompson Deady, Henderson Brooke Deady, et al, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit E, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANTS' PRE-TRIAL EXHIBIT E

Whereas Marye T. Deady has filed suit in the Circuit Court of the State of Oregon for Multnomah County against Henderson Brooke Deady, Mary E. Deady, Matthew Deady, Hanover Deady and Henderson Brooke Deady and Joseph Simon as execu-

(Testimony of Hanover Deady.)

tors of the estate of Lucy A. H. Deady, deceased, being Case No. K 8897, for the relief claimed in said suit, among other things for an undivided one-third interest in Lot one, Block two hundred twelve, in the City of Portland, County of Multnomah, State of Oregon, and

Whereas the undersigned, being all the beneficiaries and legatees under the will of Lucy A. H. Deady of said property, and being all the persons interested in said property and in the income therefrom, have compromised and settled the controversies created by said suit, whereby said suit is to be dismissed without costs and with prejudice. now therefore

In Consideration of the Premises, and of said settlement and the dismissal of said suit, and of the execution of this agreement, it is agreed by the undersigned that from the income derived from said Lot 1, Block 212, there shall be paid to Marye T. Deady (she being the same person named as Marye Thompson Deady in the will of Lucy A. H. Deady) during the term of her natural life and beginning November 1, 1925, the sum of One hundred fifty Dollars (\$150.) per month, payable monthly. Such monthly payment shall supersede and be in lieu of the monthly payment of \$75. provided for said Marye T. Deady in said will of Lucy A. H. Deady. All other payments of income provided for in said will shall remain as specified in said will, except that Henderson Brooke Deady shall continue to be

(Testimony of Hanover Deady.)

paid four hundred Dollars per month, or such other sum per month during the administration of the estate of said Lucy A. H. Deady in the discretion of the executors as they may deem proper and until he shall become entitled to the full distribution provided for in said will, and the stipulation and agreement made by the parties October 1924, is hereby rescinded and cancelled; but the payments of \$150 per month each to Marye T. Deady and to Mary E. Deady shall have priority over other payments of said income.

And the undersigned hereby expressly authorize and direct said executors and the trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to make the monthly payment of income to Marye T. Deady hereinbefore agreed to without other or further authority, direction or order from any person or any court; and the undersigned hereby authorize and direct the said executors and the trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to defer the creation of a sinking fund under paragraph Fifth of the will of Lucy A. H. Deady, deceased, until after the death of either Marye T. Deady, Mary E. Deady *of* Henderson Brooke Deady, and upon the death of any one of said three persons named, the sinking fund provision of said will shall be effective; and the undersigned for themselves, their heirs, administrators,

(Testimony of Hanover Deady.)

successors and assigns and for all persons claiming by, through or under them, or any of them, hereby expressly waive and release all claims of any and every nature whatsoever which they or any of them might have or assert against any executor, trustee or trustees, manager or managers, their heirs, administrators, successors or assigns, by reason of such monthly payments of income to Marye T. Deady, or by reason of deferring the creation of such sinking fund, or by reason of any thing resulting from or attributable to such monthly payments of income to Marye T. Deady, or the deferring of such sinking fund.

It is agreed that said Marye T. Deady shall make, execute and deliver to Henderson Brooke Deady, Matthew Deady, and Hanover Deady, in proportion to their interests in said Lot 1, Block 212, City of Portland, Oregon, under said will of Lucy A. H. Deady, deceased, a special warranty deed to said lot 1, Block 212, City of Portland, Oregon, and said deed shall be subject to the terms of this agreement, and to the payment of said \$150. per month to said Marye T. Deady during the remainder of her life. And said lot shall be impressed with and be held in trust and remain in the possession of the trustees and the income from said property shall be collected and distributed by the trustees and said property shall be and remain charged with the payment of said \$150. per month to said Marye T. Deady during the remainder of her natural life.

In Witness Whereof, the parties have hereunto

(Testimony of Hanover Deady.)

set their hands and seals this 28th day of October,
1925.

Witnessed.

L. W. Humphreys

Chester V. Dolph as to

Henderson Brooke Deady (Seal)

Matthew Edward Deady (Seal)

Hanover Deady (Seal)

John S. Coke

Mae Connors

As to signature of Marye T. Deady

Marye T. Deady (Seal)

Mary E. Deady (Seal)

Accepted.

HENDERSON BROOKE DEADY

JOSEPH SIMON

Executors.

State of Oregon

County of Multnomah—ss.

This certifies that on this 28th day of October,
1925, before me, the undersigned, a Notary Public
in and for said County and State, personally ap-
peared the within named Mary E. Deady, who is
known to me to be the identical person described
in and who executed the foregoing instrument and
acknowledged to me that she executed the same
freely and voluntarily for the uses and purposes
therein mentioned.

(Testimony of Hanover Deady.)

In Testimony Whereof, I have hereunto set my hand and Notarial Seal this the day and year first herein written.

(Seal) ANNA GMAHLING

Notary Public for Oregon. My Commission expires: Nov. 16, 1927.

State of Oregon

County of Multnomah—ss.

This certifies that on this 28th day of October, 1925, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Marye T. Deady, who is known to me *to me* to be the identical person described in and who executed the foregoing instrument, and acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

Notary Public for Oregon. My Commission expires:

State of Oregon

County of Multnomah—ss.

This certifies that on this 28th day of October, 1925, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Henderson Brooke Deady, Matthew Deady and Hanover Deady, who are known to me to be the identical persons described in and

(Testimony of Hanover Deady.)

who executed the foregoing instrument and severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal this the day and year first herein written.

(Seal) L. W. HUMPHREYS

Notary Public for Oregon. My Commission expires:
Jan. 11, 1929.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaurequy: Q. I wish the witness would take that exhibit that has just been introduced in evidence. That exhibit is dated October 28, 1925. Was Henderson in town at that time?

A. Yes, he was in town at the time.

Q. You said some time ago that he had been in town a year or a year and a half after the death of your grandmother. This, I notice, is dated two yeas and two months after the death. Had he been in town continuously, or in and out?

A. Yes, he had been in town continuously. I don't remember exactly the time.

Q. Now, between the time of the stipulation which is Exhibit J, dated October, 1924, and the time when you signed the exhibit which you have in your hand, were there any conversations between

(Testimony of Hanover Deady.)

you and Henderson with respect to the income from the property?

A. Not except in relation to this particular stipulation or settlement here. [170]

Mr. Maguire: I didn't get the answer.

A. I say, not except in relation to this particular settlement or agreement or stipulation, or whatever you call it.

Mr. Jaureguy: Q. All right, just state what those conversations were.

Mr. Maguire: And may it be understood that as to these conversations of Henderson Brooke Deady we offer the same objections as we did to the previous conversations?

The Court: Yes.

A. Well, it was the same conversation. I will say it this way, that this happened in Joseph Simon's office, that he wanted an opportunity to receive more money and for the same reason, that he was a sick man and needed all the money he could get, that he would never have any children, that Matthew and I were coming into the property anyhow, and it was only fair that he should receive as much money as he could as soon as he could.

Mr. Jaureguy: Q. Now, those statements that he made to you, did you in any way rely on them?

Mr. Maguire: Objected to upon the ground that it is not proper to call for, under the circumstances, in regard to the statements of Henderson Brooke

(Testimony of Hanover Deady.)

Deady, it having been established, as well as in the knowledge of this witness, the relater, and Henderson Brooke Deady, and it already appears that he was advised by counsel of his rights in the matter.

The Court: Received in the same manner. [171]

A. Why, certainly I relied on them, but I also knew he was telling the truth as far as the property conditions were concerned.

Mr. Jaureguy: Q. Well, in what way did you rely on them?

A. Well, I relied on them that he was not going to have any—I mean that he didn't have any children, but that brought up the subject as to whether or not he did have a child at that time. I remember I——

Q. (Interrupting) Well, that is not what I am asking you. I am asking you whether you relied on them. Would you have signed those three stipulations if he had told you that he claimed two-thirds of the property outright?

A. No, sir, I would not.

Q. And why not?

A. Well, it would take away from the property all the sinking funds and everything else that under the will should have been given to the property, and that if he was coming into the property himself some day, why, I wouldn't see any reason for doing him any particular favor at that particular time.

Q. Now, did you ever have occasion to question his assertions that he had no children?

(Testimony of Hanover Deady.)

A. Yes.

Q. Where was that?

A. That was a conversation I had with him in the Hazelwood at lunch time. [172]

Q. Just relate that conversation, as near as you can recall.

A. At that time he brought up the fact that we were going to make a settlement with Marye Thompson Deady, that he wanted in that particular stipulation a settlement for some more money, and brought out the fact that he, again, did not have any children, wasn't going to have any, and I brought up the fact to him that I understood that there was a young man in the East who was the child of the lady that he was enamored with back there and I had understood, or I had heard rumors, rather, that it was his boy. I said, "Where do we get off signing all these stipulations if that is so?" referring to Matthew and I, and he said he didn't have any children by anybody, it wasn't so. I asked him if he would give me an affidavit to that effect, and he said he would, and he did.

Q. Could you tell us how long after the conversation he gave you the affidavit you refer to?

A. I couldn't tell you how long after the conversation. It was within a day or so after we signed this. It was a very short time, I remember that.

Q. Well, I am not sure that I got the chronology.

A. I beg your pardon?

(Testimony of Hanover Deady.)

Q. You say a day or so after you signed that what happened?

A. A day or so after we signed this that I got the affidavit.

Q. Well, do you know with respect to either the affidavit or the exhibit—— [173]

A. (Interrupting) I was referring to all three of these stipulations we signed when I brought up that fact, that we had already signed some stipulations.

Q. Yes.

A. And here we were signing another one to give him some more money, and I didn't know, if that rumor was true, where we sat in the situation.

Q. Well, what I am getting at is, do you have any recollection with reference to the time you signed the exhibit, Exhibit E, that you had that conversation? That is the exhibit you have in your hand. Was it before, or after, the same day, or when?

A. Oh, no, it was before this was signed and after the other two stipulations, the first two stipulations, were signed.

Q. That is, that the conversation took place?

A. Yes.

Q. Well, could you give us any idea how long before?

A. Well, no. It was after we had won—after Marye had lost her suit, and we was entering into an agreement to make a settlement with her.

(Testimony of Hanover Deady.)

Q. You say after she had lost her suit?

A. Well, she did not prevail in her contentions that she had any property rights outside of what she was entitled to under the will.

Q. Do you know how that suit terminated?

A. Yes. [174]

A. It was terminated in favor of the Estate, the Lucy A. H. Deady Estate.

Q. What I meant, was it in the form of a trial, or stipulation, or what?

A. Yes, it was a trial, and we answered—that is, I say “we”—Joseph Simon answered in the form of a demurrer and we won the demurrer, and then later made a settlement with her.

Q. And that settlement is that Exhibit E?

A. That is right.

Q. Then I hand you Exhibit H, Pre-Trial Exhibit H, and ask you if that is the affidavit to which you are just referring, or, rather, whether that is a photostatic copy of it?

A. Yes, that is it.

Q. Now, you say that conversation where you say that affidavit resulted was had where?

A. We were having lunch together at the Hazelwood.

Q. You didn't get the affidavit at that time?

A. Oh, no.

Q. How long was it after that that you got the affidavit?

(Testimony of Hanover Deady.)

A. I don't know, I can't say definitely, but I know that it was a very short time, two or three or four days. I don't know exactly when it was.

Q. Do you know where you got the affidavit?

A. Well, my recollection was it was in Chester Dolph's office.

Q. And where was that? [175]

A. Well, that was in the Mohawk Building.

Q. What did you do with that affidavit?

A. I kept it.

Q. Have you had it ever since? A. Oh, yes.

Q. Do you still have it?

A. I have it with me now.

Q. Now, subsequent to that time did you have any discussions or arguments with him on any proposed agreement?

A. No. I had an argument or a talk with him on a proposed agreement just before he left for the East.

Q. And where did that talk take place?

A. That took place in Joseph Simon's office.

Q. Private office?

A. Yes, his private office.

Q. And who was present at that time?

A. Well, my brother was present at that time, and a little later on Lester Humphreys came in.

Q. When was that with respect to the signing of this affidavit, before or after.

A. This was after this affidavit.

(Testimony of Hanover Deady.)

Q. And, you say, shortly before he went East?

A. Yes, shortly before he went East.

Q. All right, I wish you would explain what took place on that occasion. [176]

A. Well, he explained to me that his divorce had been granted and this suit with Marye had been settled and that he was going back and marry this lady that he wanted to marry—Charlotte was her name, Charlotte Busck—that he was going to marry as soon as he could but he probably would have to wait the time limit, six months, or five months, whatever it was, before he could marry her, but in the meantime he was afraid that if anything happened to him he would not be able to give her any money, because he would not be entitled to give her any money, and he would be able to after he married her, under his mother's will be entitled to give his income to her. I—the fact of the matter is I got very indignant about it, refused to sign it or have anything to do with it.

Q. Well, did he have the document there, or just talking about an agreement?

A. Oh, no, he didn't have the document there. He spoke of having one made and drawn up for us to sign. He may have had one, but he didn't show it to me, I never saw it.

Q. Then what happened?

A. Well, at that time he asked me to sign this I refused just point blank, and he got very indig-

(Testimony of Hanover Deady.)

nant and mad about it and, in fact, the only way I could express it, he blew up,—it was the only real quarrel we ever had—and Lester Humphreys was across the hall of the main office, he came across and got hold of Henderson, started to quiet him, while I walked out—I [177] didn't wait to listen to anything further—walked out of the main office. That is the last time I saw him.

Q. Handing you Defendants' Pre-Trial Exhibit K, I wish you would look at that and state, if you can, the circumstances under which that was signed? Pardon me, before the witness does that, we offer Pre-Trial Exhibit H in evidence, being the affidavit.

Mr. Maguire: We object to the receipt of this exhibit, because it is irrelevant and immaterial to any issue in this case, and incompetent to prove any issue in this case, on the same grounds and same reasons which we have heretofore urged as to the last two exhibits.

The Court: Received in the record, subject to the objection and further ruling.

(Photostatic copy of affidavit of Henderson Brooke Deady, dated October 29, 1925, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit H, was thereupon received subject to the objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANTS' PRE-TRIAL EXHIBIT H

In the Circuit Court of the State of Oregon
for Multnomah County.

In the Matter of the Estate of Lucy A. H. Deady,
Deceased.

State of Oregon
County of Multnomah—ss.

I, Henderson Brooke Deady, being first duly sworn, say on oath, that I am a son of Lucy A. H. Deady, deceased, and one of the heirs at law of her Estate. I further depose and say that no child or children have ever been born to me, and that I have not had and have not now any issue by marriage or otherwise.

HENDERSON BROOKE DEADY

Subscribed and sworn to before me this 29th day
of October, 1925.

(Seal)

CHESTER V. DOLPH

Notary Public for Oregon.

My Commission expires: July 21, 1928.

[Endorsed]: Filed Feb. 21, 1942.

A. This was a stipulation that was entered into in August, 1931, in which Henderson was to get a definite sum of money and in which for the first time there was to be made any sinking fund for the prop-

(Testimony of Hanover Deady.)

erty and in which at that time Matthew and I got fifty dollars more a month than was stipulated—than the will called for, for the ten-year period.

[178]

Q. Now, do you know where Henderson was when that was entered into?

A. No, I don't, but I know he wasn't here. I assume that he was either in New York or Switzerland.

Q. Did you have any conversations or communications with him with respect to that?

A. No, I did not have.

Q. And you got——

A. (Interrupting) I got my information from Joseph Simon.

Mr. Jaureguy: We offer Exhibit K in evidence.

Mr. Maguire: We object to this upon the ground that it is incompetent, on the same grounds and for the same reasons.

The Court: Same ruling.

(Certified photographic copy of stipulation, executed August, 1931, by Henderson B. Deady and Joseph Simon, executors, and Mary E. Deady, Matthew E. Deady, Hanover Deady, and Henderson B. Deady, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit K, was thereupon marked received subject to the objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANTS' PRE-TRIAL EXHIBIT K

In the Circuit Court of the State of Oregon
for the County of Multnomah
Department of Probate

22735

In the Matter of the Estate of
LUCY A. H. DEADY, Deceased.

STIPULATION

Whereas, under date of December 18, 1923, a stipulation was entered into by Henderson Brooke Deady, Hanover Deady, Mary E. Deady, Matthew Edward Deady, and Marye Thompson Deady, with the acquiescence of Joseph Simon and Henderson Brooke Deady, Executors of the Estate of Decedent, whereby the said parties, without prejudice to their rights, fixed certain sums to be drawn monthly by each of them; and

Whereas, in October, 1924, a supplementary stipulation was entered into between the said parties, changing in one respect the monthly sum so allotted; and

Whereas, neither stipulation was made effective for any definite period but was and is subject to abrogation, prospectively, by any of the parties at any time; and

Whereas, the said stipulations were silent with regard to the residue of the income, and the Executors, after curtailing the principal mortgage indebted-

(Testimony of Hanover Deady.)

ness and paying interest thereon, and distributing the fixed sums awarded by the Stipulation to Matthew Edward Deady, Hanover Deady, Mary E. Deady and Marye Thompson Deady, have, until February, 1931, turned over the approximate balance of the income to Henderson Brooke Deady; and

Whereas, it is the desire of the parties to effect a definite allocation of estate income for the remainder of the 10-year period mentioned in the Will of Lucy A. H. Deady, beginning August 1, 1931, and continuing until the end of August, 1933;

Now, therefore, for and in consideration of the premises, the undersigned parties agree to and with each other as follows:

1. Each of the undersigned parties ratifies, confirms and approves the disposition which the Executors of the Estate of Lucy A. H. Deady have up to this time made of the income received by said Estate, and releases and discharges each of said Executors from and against any claim arising from the failure on the part of said Executors, and/or either of them, to follow the precise mandate of the Will of Decedent, or of either of said former stipulations.

2. The income of said Estate, during the period above mentioned, shall, from and after August 1, 1931, be distributed as follows:

- (a) Payment of interest on mortgage indebtedness.

(Testimony of Hanover Deady.)

- (b) Setting aside of \$100.00 per month to be applied, as and when practicable, upon reduction of the principal of the mortgage indebtedness.
- (c) \$150.00 per month to Mary E. Deady
150.00 per month to Marye Thompson Deady
150.00 per month to Matthew Edward Deady
150.00 per month to Hanover Deady
600.00 per month to Henderson Brooke Deady.

3. If the net income of said estate, for any cause, is diminished to such an extent that funds with which to effectuate same are not available to the Executors, the percentage basis of allocation contained in the foregoing paragraph shall be followed in the distribution of the diminished fund. If the death of Mary E. Deady or Marye Thompson Deady occurs prior to the expiration of the period herein fixed, the sum to be paid such decedent hereunder shall, during the remainder of said period, be added to the amount payable to Henderson Brooke Deady hereunder.

(Testimony of Hanover Deady.)

Witness the following signatures and seals this
day of August, 1931.

HENDERSON B. DEADY

JOSEPH SIMON

Executors

MARY E. DEADY

.....
MATTHEW E. DEADY

HANOVER DEADY

HENDERSON B. DEADY

[Endorsed]: Filed Oct 9 1931. A. A. Bailey,
Clerk, O. C. Thornton, Deputy.

State of Oregon,
County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder
of Conveyances and Ex-Officio Clerk of the Circuit
Court of the State of Oregon, for the County of
Multnomah, which Court has exclusive jurisdiction
of all probate proceedings in said County, do hereby
certify that the foregoing copy of Stipulation in the
Matter of the Estate of Lucy A. H. Deady, De-
ceased, Est. No. 22735 has been compared by me
with the original, and that it is a correct transcript
therefrom, and of the whole of such original Stipu-
lation as the same appears on file in my office and in
my custody.

(Testimony of Hanover Deady.)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal) A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Q. I want to hand you Pre-Trial Exhibit K and wish you would look at that and tell us what you know, if anything, of the circumstances leading up to the preparation of that exhibit? A. Shortly after—— [179]

Mr. Maguire: (Interrupting) as to this document which has been handed to the witness, we object to either testimony with regard to the same or the receipt of same or any part thereof in evidence, for the reason that to the knowledge of this witness and of the other defendants it was a document prepared upon a proposed offer of compromise and is wholly incompetent to be received in the case.

The Court: The direction is the same. [180]

Well, in any event, following my idea that all this testimony should go in the record here, I will receive it on the same terms.

Mr. Jaureguy: Q. Now, do you remember the question?

(Testimony of Hanover Deady.)

A. No, I would rather have it repeated, please.

Q. State what you know about the circumstances leading up to the preparation of that document.

A. Shortly after Uncle Henderson died I went down to see Joseph Simon. [187] In my conversation with him about the status of the estate——

The Court: (Interrupting) I think that is not proper, Mr. Jaureguy. [188]

Mr. Jaureguy: Q. Then thereafter what did you do?

A. Well, it is pretty hard to explain. I don't want to say anything I shouldn't, but shortly after Henderson died I took the will and read it over again, trying to digest it, and went to Ralph Wilbur and explained to him and asked him about what amount and for what period Charlotte Deady should receive a certain amount of money. My thought was that Henderson had died within the ten-year period and was getting a certain stipulated sum at that time, and I couldn't understand or didn't understand as to whether she was to continue to get the amount that he was getting or exactly what amount she was to get and for how long.

Q. And how long would you say after Henderson's death was it that you went up to Ralph Wilbur?

A. Well, it wasn't very long; within two or three weeks, maybe less than that.

(Testimony of Hanover Deady.)

Q. And then what happened as a result of your conversation with him?

A. My opinion at that time, as I told him, that I thought that inasmuch as Henderson——

Mr. Maguire: (Interrupting) I move that this be stricken. It is not responsive to the question.

Mr. Jaureguy: The opinion, or the—— [189]

Mr. Maguire: (Interrupting) Or his conversation with Mr. Wilbur.

The Court: Yes, the last part, the last answer is stricken.

Mr. Jaureguy: Q. What happened after your conversation with Mr. Wilbur?

A. Well, after the conversation, then Mr. Wilbur drew up a stipulation which——

Q. (Interrupting) Do you know where that stipulation is? A. No, I don't.

Q. Or any copy of it? A. No, I don't.

Q. All right, proceed.

A. (Continuing) —which purported to be that Charlotte Deady should receive the same amount of money——

Mr. Maguire: (Interrupting) Just a minute. Mr. Wilbur drew up the stipulation. I assume that there is in his files there a copy of the stipulation.

[190]

Mr. Jaureguy: Q. Now, without telling what was in that document, what happened to it? Did Mr. Wilbur keep it or did he send it off, or what?

A. Oh, no, he sent it East to be signed.

(Testimony of Hanover Deady.)

Q. And then what happened? Did it come back?

A. No, it didn't come back.

Q. And what did come back?

A. This stipulation here came back.

Q. And you are referring now to Pre-Trial Exhibit K?

A. That is correct.

Q. And what happened when that came back?

A. Well; I was notified by Mr. Wilbur that it had come in his office, and after going up and reading it I refused to sign it, because it was the same thing that the will covers.

Q. What do you mean by that?

A. Well, I don't know whether I can refer to the other stipulation or not, but I—

Q. (Interrupting) No, just refer to this one. What do you mean by that statement?

A. I didn't see any reason for signing it. It didn't give us anything further than what the will covers.

Q. No, you didn't get my question. You said that it didn't give you anything other than the will gave you. Just explain what you mean by that.

A. Well, it said the same thing that the will said.

Q. Well, explain why that is true, why that was true in your mind. [192]

A. Well, I knew what the will said. My grandmother had told me and Henderson had told me and I read it myself. I knew what the will said.

Q. What does this say that you say is the same thing as what the will says?

(Testimony of Hanover Deady.)

A. Oh, I see what you mean. Well, that Charlotte Deady should receive two-thirds of the income for her life, as given Henderson the right to give her at the time of his death, and it didn't give Matthew and I any more money out of it. It also was agreed that we owned the property, the same thing as the will said.

Q. Now—don't answer this, if counsel wants to object—Did you discuss that with Mr. Wilbur?

Mr. Maguire: Object to that as being irrelevant and immaterial, incompetent to prove any issue in this case.

The Court: Q. Now, up to that time had anybody ever asserted to you or claimed that after Henderson's death without children you and Matthew did not own the property or would not own the property? A. No, they did not.

Q. And when was the first time you ever heard any such claim?

A. I think the first real claim was when I got a letter from Bob Maguire.

Mr. Maguire: The first real claim?

A. Yes. I heard indications that they were going to bring a suit, but I hadn't heard that. [193]

Mr. Jaureguy: I wonder if we could have Plaintiff's Exhibit 3 and show it to the witness. I want to ask you if that is the letter you referred to just a moment ago?

A. That is the letter I referred to.

(Testimony of Hanover Deady.)

Q. Now, at the time that you spoke about when you went up to Ralph Wilbur's office and didn't sign that stipulation, did you in any way rely on the statements that you testified to that Henderson Brooke Deady made to you that on his death you and Matthew would own the property?

A. Yes, sir.

Mr. Maguire: Object to that as being wholly incompetent and irrelevant, patently, upon the testimony of this witness, not competent or relevant, and a conclusion, and wholly self-serving.

The Court: Received under the same condition.

A. Yes, I did.

Q. And in what way?

A. I don't know how to explain it any better than I have. Henderson had explained to me all the time that he would die without issue and we would come into the property.

Q. Now, if he or anybody else had ever told you that Henderson had a fee simple estate or that he had an estate that he could will or devise to others after his death would you have refrained from signing that or would you have signed it if anybody had made such a contention? [194]

Mr. Maguire: Objected to as wholly speculation, could not be competent or relevant to prove any issue in this case and not to mention as leading and suggestive.

Mr. Jaureguy: To show reliance on it. The only way to find out if a man relied is to ask him, and

(Testimony of Hanover Deady.)

we could put it hypothetically, if we can't otherwise, to explain what his position would have been.

The Court: He may answer under the same condition.

A. I certainly would have signed it.

Mr. Jaureguy: Now we wish to offer Pre-Trial Exhibit G in evidence.

Mr. Maguire: To the receipt of this exhibit the plaintiff objects, upon the ground that it is wholly irrelevant, incompetent and immaterial to prove any issue in this case, and the further grounds and reasons that we have heretofore suggested as to other documents of this kind, and, further, that it is incompetent to receive in evidence any document or any other matter in negotiation of a compromise settlement.

The Court: Received under the same conditions.

(Copy of unexecuted agreement between Charlotte Howell Deady, Hanover Deady, and others, dated October 22, 1934, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit G, was marked received subject to the objection, ruling reserved.)

[195]

Mr. Jaureguy: Q. Now, referring again to Exhibit G, I wish you would look at that document again and on the last page where what purport to be typewritten copies of signatures are. When you went up to Ralph Wilbur's office was there any signature on there other than those?

(Testimony of Hanover Deady.)

Mr. Maguire: May it please the Court, this is offered and received as being a copy of the instrument. Now, if you are going to impeach the instrument—

Mr. Jaureguy: Well, as Mr. Freed explained in his opening statement this was copied from a copy of which Ralph Wilbur never could find the original until long after the pre-trial, and it is just in explanation of that that this is going in. If after the testimony has gone in counsel thinks he has an additional reason for it not going in evidence, then I think we could have it then.

Mr. Maguire: I have no objection to examination and then subsequently substituting. I don't know what he is going to testify to, because neither my client nor anyone else has been around any of these things.

The Court: I suggest an amendment of the pre-trial order and the introduction of the original in evidence.

Mr. Jaureguy: Very well, then. We do not have the original here, but we will have before the case is over.

The Court: Yes.

Mr. Maguire: That is all right. I make no point of it. [196]

The Court: I think before you proceed to any further subject we will take a short recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

(Testimony of Hanover Deady.)

Mr. Jaureguy: Now, this is all the direct examination. If there is to be any cross-examination, I assume that if he cross-examine upon any matters that were admitted subject to objection the cross-examination will be with the same understanding, that it is admitted subject to objection, without our raising the question all the time.

The Court: Yes.

Mr. Grant: And, further, your Honor, may it be understood that by cross-examining on some of those matters we are not waiving our objection to the right to have the Court ruling in our favor later?

The Court: Oh, no. You can drive that hay wagon any place you want to.

Mr. Grant: Very well.

The Court: Except that I do ask you, which I think you are doing, to develop your legal points, so that I will have the basis before me when I come to consider it.

Mr. Maguire: We will try not to lead your Honor into error by keeping quiet.

The Court: I have one exhibit. I have the stipulation. [197] Do you wish that, Mr. Maguire?

Mr. Maguire: Yes, your Honor, I did want to see that, if I may.

Cross-Examination

By Mr. Maguire: Q. Let's see, your grandmother, Lucy A. H. Deady, died in 1923, did she not? A. That is correct.

(Testimony of Hanover Deady.)

Q. And at that time you were approximately twenty-eight to thirty years of age?

A. Yes, sir, that is right.

Q. And at the time of Mrs. Deady's death Henderson Brooke Deady was not here in the city?

A. Yes, he was.

Q. At the time of her death?

A. At the time of her death.

Q. And how long, approximately how long, had he been here prior to the time she passed away?

A. About a month or six weeks, my best recollection.

Q. Now, you spoke of your stepmother. Until you were eighteen years of age you had always known of her, thought of her, as your own blood mother?

A. That is right.

Q. And your feeling toward her was the feeling of a son toward a mother? [198]

A. Yes, sir.

Q. And that feeling has continued, has it not?

A. Yes, sir.

Q. And still exists? A. And still exists.

Q. And existed until she unfortunately passed away, is what I meant to say. And your stepmother, Mary E. Deady, was the wife, and the unestranged wife, of your father at the time of your father's death? A. Yes, sir, that is correct.

Q. Now, you spoke of several conversations which you had had with your grandmother prior to

(Testimony of Hanover Deady.)

the time that your Uncle Paul died. In what year did he die? A. He died in 1920, March, 1920.

Q. And had he been in ill health for sometime prior to that?

A. No, he had not. He died very suddenly.

Q. And, after that, you spoke of other conversations which you had had with your grandmother and in which she mentioned the fact that Dr. Henderson Deady was a sick man. A. That is right.

Q. And had he been ill, as a matter of fact, had he been ill for a considerable period of time before this conversation?

A. That was my understanding, that he had been sick.

Q. Over a course of years?

A. Yes, over several years. [199]

Q. And was it looked upon as an illness which in due course would carry him away?

A. Well, I couldn't answer that question. I don't know. I know that he was supposed to have had ulcers, very sick for a long time.

Q. For about how many years prior to your grandmother's death had that condition existed and been known to you and to her and to the other members of the family—or to you and to her, rather?

A. Well, I couldn't say definitely how long it was, but it seems that it was a good many years, that is the only way I could put it,—four, five, six years, maybe longer.

(Testimony of Hanover Deady.)

Q. As a matter of fact, his health had been such that he was unable to engage in any gainful occupation, hadn't it, for a number of years?

A. Well, that was my understanding.

Q. And, so far as you know, that condition continued, did it not, up to the time of your grandmother's death and afterwards? A. Yes, sir.

Q. Now, when, approximately, was the first conversation which you had with your grandmother in which she made any statements relative to the disposition of her property?

A. Well, I know it was the year of 1920, because it was shortly after Paul died,—I couldn't say whether it was one month, two months, or exactly when—and it was after she had made her [200] will, because she—of course, she had spoken to me about the property off and on, but I take your question to be, had she explained to me about what she was going to do with the property at that particular time?

Q. Well, during your Uncle Paul's life did I understand you upon direct examination to say that she had talked to you about the property?

A. Oh, yes. Nothing definite. She would just say that Matthew and I were going to come into the property, she was going to give us the property some day.

Q. That was before Paul's death?

A. That was before Paul's death.

(Testimony of Hanover Deady.)

Q. After your garndmother died you obtained—or you first heard read a copy of the will, did you not? A. That is right.

Q. And who read the will to you?

A. Joseph Simon, in his office.

Q. Approximately how long after your grandmother died?

A. Well, it was about a week or ten days. Pretty——

Q. (Interrupting) And you thereupon obtained a copy of the will, did you not? A. Yes, sir.

Q. And read it then yourself, did you?

A. Yes, sir.

Q. And after having read it you consulted an attorney about it, [201] I believe you stated.

A. I did not consult an attorney about it until Mr. Henderson—until Henderson came to me and asked me for money.

Q. And that was the first time that you consulted a lawyer about it? A. Yes, sir.

Q. And what lawyer did you consult about it then? A. Ralph Wilbur.

Q. What year was that?

A. Well, it was either late 1923 or early in 1924, around in there some place.

Q. Did you obtain from him his construction of the will?

A. Yes, I did. I went over, talked over the will, but my point in going to him was to see whether it

(Testimony of Hanover Deady.)

would be all right for Henderson to have the money at that particular time.

Q. And he read the will, did he?

A. Yes; I gave him a copy of it.

Q. You say you gave him a copy of it?

A. Yes; gave him my copy, I think.

Q. And that was given to him for the purpose of his making an examination and rendering an opinion?

A. Yes, in regards to Henderson borrowing the money—or getting the money.

Q. In regard to Henderson borrowing?

A. No, I don't mean borrowing. I mean getting some money to [202] live off of.

Q. Now, I wish you would give me, as nearly as you can recollect, the first time that you had any talk with your grandmother with regard to her property and the disposition of it, when it was, where it was, and who, if anyone, was present.

A. A conversation that I had with her in which she—well, you say when I first had any conversation?

Q. Yes.

A. Well, I am unable to do that, except that I can say that whatever conversation took place took place in her apartment at the Alexandra Court,—took place in her apartment in the Alexandra Court.

Q. That is where the first one took place?

A. Yes, and, as I said before, that was during Uncle Paul's—while Uncle Paul was alive, and she

(Testimony of Hanover Deady.)

never went into detail about it. She just said that Matthew and I were going to come into—she was going to see that Matthew and I came into that property some day.

Q. Was anyone else present at that conversation?

A. I can't recollect whether they were or not, because my best recollection would be that the nurse would be there, Miss Brown, but whether she was at that particular time or those particular times I don't know. She was always with her.

Q. When was the second conversation, and where? Well, before we get into that, about how long before your Uncle Paul's death [203] did the first of these conversations take place?

A. Oh, I couldn't say that. I used to go up and see her on the average of once a month, twice a month sometimes. She wouldn't always speak of it whenever I went up, but she did quite frequently. That is the way I remember it.

Q. Well, about how many times did she speak of it prior to your Uncle Paul's death?

A. Well, my answer to that would be several times. I couldn't say. It is so long——

Q. (Interrupting) Could you give us even an approximate idea? A. No, I couldn't.

Q. Were her statements in response to any inquiry you made?

A. Oh, no. She just was interested in us boys and she used to make those statements to me, that is all, at that time.

(Testimony of Hanover Deady.)

Q. Would it be as many as half a dozen times prior to the time your Uncle Paul died?

A. Well, Mr. Maguire, I couldn't state definitely. It is a long time ago. I couldn't state how many times she spoke of it.

Q. Well, those would be matters of some importance. I am trying to get your best recollection of it.

A. Well, my best recollection would be several times. I couldn't name any number of times. It would be ridiculous for me even to try to.

Q. After your Uncle Paul died when was the first time that you [204] had any conversation with her?

A. Well, I would say very shortly after Uncle Paul died, one of the times when I had gone up to see her, that she made the statement that she had now got her affairs in order and that she had left the property to Matthew and I, then she went on to explain how she had left it.

Q. Let's just have what she said.

A. Well, I can't repeat, word for word, what she said, but she explained to me that she had left the property to Matthew and I and she had left Henderson a certain portion of the property.

Q. What did she say? What did she say about that?

A. She said that she had left Matthew and I the property and she had left Henderson a portion of the property, that if he had children he would come

(Testimony of Hanover Deady.)

into it some day, but that she didn't expect him—or knew, in fact,—I will take that back—she knew, in fact, that he wouldn't have any children. She left him a certain portion of the property if he had any children, and that if he didn't, why, Matthew and I was to come into all of it. She said he was a sick man and couldn't have any children. Also intimated, also said that he wasn't living with his wife at that particular time, and that—that at, although he had been trying to get a divorce from her, that she hoped that Amalie wouldn't give him a divorce. That was the only time that she ever went into detail with me about the property, but she did state on several occasions, after I had [205] visited her, several times during her lifetime, that Matthew and I had nothing to worry about, we was coming into the property.

Q. Let's keep—I don't want to prevent you from testifying to any matters that you may want to, but let's keep to the question that I am asking you.

A. I beg your pardon.

Q. Now, was anybody present at that conversation?

A. No, there wasn't, unless the nurse was there; I don't recollect right now.

Q. And can you give us any closer date, any better information, rather, as to how long after your Uncle Paul died was it that this conversation took place?

(Testimony of Hanover Deady.)

A. No, except that it was shortly after she had made her will. I don't know exactly what date it was that she had made her will. That was in 1920.

Q. Well, it is admitted that she made her will in July, 1920. A. Well, it was shortly after that.

Q. Did you bring this subject up?

A. No, sir, I did not.

Q. She brought it up of her own motion?

A. Yes, sir.

Q. What was the occasion for the matter coming into the conversation?

A. I couldn't account for it, except that she was interested in [206] us boys, interested in the family, she wanted to have us interested in what she was doing.

Q. Now, then, after that when was the third occasion—the next conversation, rather? About when and where was it?

A. Well, the rest of the conversations were just as indefinite as they were when Paul was alive: she just made the remarks on different occasions, whenever I went up there to see her. Not every time I went to see her, but occasionally.

Q. You say they were just as indefinite. What do you mean by that?

A. Well, I mean that she didn't go into detail and explain to us—explain to me any further than she had explained, but that——

Q. (Interrupting) Well, what did she say?

(Testimony of Hanover Deady.)

Take the very next one of those occasions.

A. Well, for instance, when I was leaving the apartment she probably—I mean when I was leaving the apartment she would make the remark, “Now, you haven’t got anything to worry about. Just go ahead and make something of yourself, because some day you boys are coming into this property.” She wouldn’t always say it, but it was words like that. I can’t remember what they were.

Q. And did she mention Henderson’s sickness, ill health?

A. Well, I remember she did it that first time, but——

Q. (Interrupting) Well, did she do it again?
[207]

A. Not in reference to the property at all, she never made any reference to Henderson’s ill health.

Q. On only the one occasion did she make reference to ill health? You are sure of that, now?

A. Well, you can’t be sure, Mr. Maguire, fifteen or twenty years afterwards, but that is the way I recollect it.

Q. All right, that is the way I expect you to do, give your recollection. Now, after your grandmother died you say that you got the idea—you looked at the will and got the idea that Henderson’s widow could be prevented from receiving the income?

A. After Grandmother died?

Q. Yes.

A. Oh, no. After Uncle Henderson died.

(Testimony of Hanover Deady.)

Q. You are correct and I am in error. I mean after your uncle died. About how long after his death was it that this idea came to you?

A. Well, that is rather indefinite, too, but it was a very short time afterward.

Q. You know of no memorandum or any way you can determine that approximately?

A. No, I had no memorandum of it at all. I was—shortly after Uncle Henderson died I went down to see Mr. Simon.

Q. Did you write him any letter?

A. Not that I remember of. I am sure I did not.

[208]

Q. Did you get any attorney to write him any letter?

A. Well, I went to Ralph Wilbur on it. He may have written him some letters.

Q. Did you talk to Mr. Oppenheimer about it?

A. I believe he was there at one of our conversations.

Q. You mean at one of the conversations with Mr.— A. (Interrupting) Wilbur.

Q. (Continuing) —with Mr. Wilbur?

A. Yes.

Q. Now, from that time on did Mr. Wilbur or Mr. Oppenheimer represent you and your brother in any claims, demands, or negotiations that were had with Charlotte Howell Deady or her agents or representatives?

A. Yes, Mr. Wilbur represented me.

(Testimony of Hanover Deady.)

Q. Well, Mr. Oppenheimer represented you, too, didn't he?

A. Well, whatever work he did, he did at the instigation of Mr. Wilbur. I mean I was dealing with Mr. Wilbur. He was part of the law firm there.

Q. In other words, the firm of Wilbur, Beckett, Howell & Oppenheimer were representing you?

A. Yes, sir.

Q. But most of your conversations were with Mr. Wilbur? A. That is right.

Q. You were not present at any conference had between Mr. Oppenheimer and Senator Simon and Robert Maguire, were you, [209] in Senator Simon's office?

A. No. I was there when Mr. Robert Maguire and when Mr. Simon and Mr. Ralph Wilbur and myself were there. I don't remember Oppenheimer being there. He may have been, I won't say that he wasn't, but Ralph Wilbur was there.

Q. Are you sure of that? Wasn't it Mr. Oppenheimer? A. No, it was Ralph Wilbur.

Q. Was anyone else there?

A. That is all I remember were there.

Q. Was Mr. Strong there?

A. No, I don't think he was.

Q. Do you remember when that conference took place?

A. Well, it took place about the time when we were trying to get these stipulations. I don't remember exactly what time that was.

(Testimony of Hanover Deady.)

Q. Now, for the purpose of refreshing your recollection, wasn't that several months prior to any preparation of any documents of any kind looking toward any compromise settlement?

A. I couldn't say as to that. I know I talked to Mr. Ralph Wilbur several times before we started any negotiations of any kind, but whether that particular conference was held before the stipulation was drawn up I couldn't say. I know we hadn't signed any, and I don't recollect any stipulations at that time. It probably was before, but I wouldn't say. In fact, I had forgotten all about being down there in that office.

Q. Well, were you not, through your counsel, making a claim [210] that Charlotte Howell Deady was entitled to nothing more——

A. (Interrupting) No, sir.

Q. (Continuing) —from the estate?

A. No, that was—no, sir, I was not. I was making claim that Charlotte Howell Deady was only entitled to the amount of money that Uncle Henderson was getting when he died, and that was all the claim I was making, and that the extra money that Marye was getting and my mother was getting, if they died, should come back to Matthew and I.

Q. Now, you understood my question, did you?

A. I am sure I understood your question.

Q. Well, hadn't you considered and discussed whether or not, if Henderson Deady had died—

(Testimony of Hanover Deady.)

having died within the ten-year period, that his widow could obtain no benefit under any power of appointment and was entitled to no payments at all? A. I never made such a claim as that.

Q. Didn't your attorney make claim of that for you?

A. Well, if he did he misunderstood what I was claiming about it, because I had no such intention. My idea was that she was only entitled, because Henderson did die during that ten-year period, to what he was getting at the time of his death for the rest of her life.

Q. Now, you are very clear about that, are you?

A. That is what my intentions were. That is the reason I went up to Ralph Wilbur. I had no intentions of claiming any other [211] situation.

Q. Well, didn't Mr. Oppenheimer, in your behalf, make claim in the conference which was had in Senator Simon's office that because Henderson had died before the end of the ten-year period his interest in the property was extinguished at the time of his death and he had nothing to pass on to his widow?

A. Not with my knowledge. I am not saying he did not make such a claim, Mr. Maguire, but that was——

Q. (Interrupting) And you never heard that he made any such claim?

A. No, I never heard that he made that, exactly that claim. In fact, I didn't know that Oppenheimer had made any claim at any time.

(Testimony of Hanover Deady.)

Q. Well, did you know that Mr. Wilbur had made any such claim?

A. No, I didn't know that Mr. Ralph Wilbur had made any such claim as that.

Q. Did you know that anyone had made any such claim on your behalf? A. No, I did not.

Q. Had you heard that anybody had made any such claim as that in your behalf?

A. No, I hadn't heard of that.

Q. At any time? A. No, not at any time.

Q. This is the first time you have ever heard it?

[212]

A. This is the first time I have ever heard it.

Q. Well, don't you know, as a matter of fact, that the negotiations of which you have been talking, that you talked about on your direct, were as to whether or not Charlotte Howell Deady was entitled to anything, or whether or not she was entitled to a two-thirds fee ownership of that property?

A. No, all I know is that it was a question in my mind of whether she was entitled to two-thirds of the income of that property, because Henderson died within the ten-year period. Henderson died with an income of six hundred dollars, if my recollection serves me aright, and I was wondering whether that was all she was entitled to for the rest of her life, because Henderson had died within the ten-year period, not that she wasn't entitled to anything.

(Testimony of Hanover Deady.)

Q. Well, why would the ten-year period have anything to do in your mind, or did it have anything to do in your mind, as to whether or not she was entitled to six hundred dollars a month or whether she was entitled to two-thirds of the property?

A. That was the way I understood the ten-year period, because Grandmother had set up certain provisions within the ten-year period, but after the ten years she stated, as I recollect the provisions of the will, that then Henderson was to get two-thirds of the income.

Q. Well, now, I hand you here a copy of the will—it starts on the preceding page with all the operative provisions—— [213] and I wish you would read it and tell me what provision you had in mind when you came to the conclusion that there was a question as to whether she was to have two-thirds of the income, or two-thirds—or six hundred dollars a month, rather, that being what Henderson was receiving at the time of his death?

A. Well, I understood that it was six hundred dollars a month, under that stipulation.

Q. Are you ready now to answer the question?

A. Yes; in the ninth paragraph it states that “the monthly payments directed to be made to my grandsons and the residue of the income directed to be paid to my son, Henderson Brooke Deady, provided for in Item 5 of this will, shall continue for a period of ten years after my death, and there-

(Testimony of Hanover Deady.)

upon and thereafter the net income derived from said lot", and so on and so forth, "shall continue and follow the title and ownership of said real property."

Q. And, as you read that and after having consulted your attorneys, you came to what conclusion?

A. I came to the conclusion before I ever consulted my attorneys that Henderson died—having died within the ten-year period, was only entitled—I mean died within the 10-year period, was getting so much money, and therefore his wife, who was then living, would be only entitled to the income he was getting at that time for the rest of her life.

Q. Irrespective of what the income of the property was?

A. Irrespective of the income of the property. It might have [214] been more or less, but at that time it was six hundred dollars.

Q. Mr. Bailiff, I will ask you to hand these two papers to this witness. I will ask you to state if you don't recognize that as a copy of a letter addressed by your counsel, Wilbut, Beckett, Howell & Oppenheimer, to Senator Joseph Simon, of date July 10, 1933, with regard to your claims?

Mr. Jaureguy: Object to that on the ground that we have been required to produce, or we did, in response to what we understood the ruling of the court was, produce at pre-trial all the documents that we were going to bring into this court for trial,

(Testimony of Hanover Deady.)

and this was one that was brought into pre-trial by counsel.

The Court: The objection is sustained.

Mr. Maguire: Well, if your Honor please, I would like to be heard on that, if your Honor will permit.

The Court: Yes. [215]

The Court: Well, I think that the difficulty here arises from the fact that I have allowed some matters to go into the record without ruling on them, ruling as to inclusion or exclusion, which are now brought into controversy by cross-examination. As I read the pre-trial order, there is no issue as to this controversy about Charlotte Deady or the matter that is now brought up. It is true there is that exhibit offered and rejected, but there is no square-out allignment upon the proposition of what that compromise offer was, and, as I view it at the present time, it is not an issue in the case.

Mr. Grant: If your Honor please, just one word. That document of itself does not tend to prove or disprove any issue in the case. The fact is, however, that on the cross-examination of this witness he has made a statement, we believe disproved by the document, for the purpose of impeaching his credibility. We should be allowed to introduce the document. Your Honor might rule that it was too remote and should not be allowed for the purpose of impeaching him or testing his memory, but you should not

(Testimony of Hanover Deady.)

rule it out because it is not in the pre-trial [224] order, because if we were in claiming that this document of itself were something that proved what the will meant, the will was, then we would be in a far different position, but I think it is a matter for your Honor to determine whether or not we may properly on cross-examination go into the truth or falsity of a statement as to the claim he was making. If we might go into it at all, then it would be a wrong interpretation of our pre-trial rules to say that for the purpose of doing that one thing we could not submit to him a document which might refresh his memory and which we believe is contrary to the statements he made as to the position he then took.

The Court: Well, as I say, I don't see that this is reserved in the pre-trial order, this question, at all. It is true that I did admit the evidence subject to future ruling, and it may be that I will rule it out. Now, if it is not material, then you are bound by the answer of the witness. It doesn't make any difference what proof you could adduce to say that his memory was not correct, or that he was telling a falsehood—if the answer is immaterial to the issue, then you are bound by the answer of the witness. You can't either impeach him by some other document nor can you produce testimony to prove he is wrong, if the answer is not material to the issue. That is the ordinary rule of all proceedings. You take your chances on cross-examination, if you ask

(Testimony of Hanover Deady.)

a man something that is not material to the issue, for whatever purpose. [225]

Mr. Maguire: Well, your Honor, if a matter is brought out on direct examination, may we not cross-examine upon it? Are we bound by his answer on direct examination?

The Court: Well, as I say, it all depends on whether it is material to the issue. Now, as I say, I do not think that this pre-trial order reserves the question for trial which is now being debated, that is, this question of this compromise. I doubt that the position of Charlotte Deady is brought into question by the pre-trial order. Now, that is just an offhand interpretation. If I eventually rule this evidence out I will rule it out because it is not material on direct examination, rule it out because it is not material to the issues as laid by the pre-trial order. Upon that, then, you are bound by that ruling. If it is not material, why, then you can't cross-examine on it. But, this informal way that we are proceeding is what has gotten us into the difficulty.

Mr. Maguire: I appreciate that, your Honor, and I suppose the only thing we could then do would be to ask your Honor for a ruling at this time upon the materiality of the testimony with regard to this offer of compromise and his alleged actions in regard thereto, because obviously it would be wholly unfair for us to be penalized because we have been proceeding here, both Court and counsel, in a more

(Testimony of Hanover Deady.)

or less unusual way. So, then, as far as this particular matter is concerned, we would ask your Honor to rule upon our objection as to the [226] materiality both of that exhibit and of testimony with regard to it.

The Court: I will accept that ruling. It is now ten minutes after five. I will suspend for this evening. [227]

Thursday, January 23, 1941, at 10:55 o'clock A.M., the trial of the above entitled cause was resumed, as follows:

The Court: Go ahead.

Mr. Freed: Your Honor, we have had a conference, the attorneys on both sides, and we are willing, representing the defendants, if your Honor wishes it or your Honor is willing, that this exhibit that Mr. Maguire spoke of, or the letter, should be added as a pre-trial exhibit at this time, but we would like, however, at the same time,—we think that there should be introduced with it the letter that was written by Joseph Simon transmitting this letter to Mr. Maguire.

The Court: The matter coming up in that way, I will permit you to amend your pre-trial order in any way that you can amend it by agreement. If it is not done by agreement I shall rule strictly in accordance with the principles that I have laid down in this matter of pre-trial procedure. I think

(Testimony of Hanover Deady.)

you are all well advised of what those are, and I take it you are all antagonistic to it. I will explain now, since this has come squarely before me in the course of a trial, why it is necessary, in my opinion, to handle the matter in this way. If pleadings, as contemplated by the rules, are the only guides to what is to be tried, then at the trial everything can come in and there are no lights upon which the Court can guide in seeing what is competent or what is not competent, or what is [229] material and what is not material testimony, or documents. If we go to a pre-trial procedure, then that must be all-inclusive, and the Court has advised the attorneys, from time to time, that since the pre-trial procedure was held just prior to trial the attorneys should be fully advised as to what contentions they were going to raise, in order that everybody should know what the issues were. Mr. Maguire yesterday seemed to be much abused because of the fact that the document was to be ruled out. I call your attention to the fact that unless I am to make the trial all-inclusive the documents must be brought to the attention not only of the Court but of the other side. It is not the first time that documents have been excluded by courts because they have not been noticed in the pleadings under the issues. I have had some excluded myself when I was practicing,—I have no doubt that all counsel have,—that is, pieces of testimony on which they rely getting into the record. Mr. Maguire claimed surprise.

(Testimony of Hanover Deady.)

I think that under the formal pre-trial procedure the surprise might well be on the other side. That was the first time that the document was brought to their attention that they had not known about previously, and if I am required to rule on the question I will strictly adhere to it. I think there is no manifest injustice shown and that I should be required to abide by the document that the attorneys are agreed does settle the issue. That is ruling squarely. I say that at this time, because there can't be any doubt in my mind as to what necessarily [230] must follow from holding pre-trial procedure. If you don't follow that rule, then the issues will come in at large and everybody will be surprised. Now, it may be that the Circuit Court of Appeals will take a different viewpoint, and when they do then we will try cases at large. But I am unwilling to follow any other guides than strict application of the pre-trial order. I should be glad to be advised, and any time I am required to do this I am going to put the thing squarely up to the Circuit Court of Appeals on that basis, but otherwise, unless there is a strict construction of the pre-trial order, neither the Court nor the attorneys will be advised of what they are trying. I think in this particular instance that there was notice given as to the raising of this particular issue. If Mr. Maguire is to rebut that with other testimony, why, that field is perfectly open. If he wanted to rebut any implications that arose from

(Testimony of Hanover Deady.)

that document, then I should beware to exclude it from the pre-trial order.

Now, if you gentlemen will dictate any amendment that you wish to the pre-trial order to include it by consent, the Court will recognize it.

Mr. Jaureguy: Might I say one other word, in view of something your Honor said? We do not want to wish to be understood as agreeing to waive the rules for any future documents they might bring in. We are referring to this particular document.

The Court: That is the ruling of the Court. You make your [231] amendment now to the pre-trial order by consent and the Court will still view the pre-trial order as governing the course of this trial.

Mr. Freed: We consent to that later——

The Court: (Interrupting) Well, I want you to make an amendment and include it in the pre-trial order at the present time; dictate it.

Mr. Freed: Let them suggest the amendment they wish and we will——

The Court: (Interrupting) I think that I had better make someone available in my office and you can dictate the amendment to the pre-trial order. I will take a short recess while you do that.

(A short recess was thereupon had, during which the pre-trial order herein was amended, after which proceedings were resumed as follows:)

(Testimony of Hanover Deady.)

Mr. Jaureguy: Mr. Deady take the stand again?

The Court: Yes.

HANOVER DEADY,

one of the defendants herein, thereupon resumed the stand as a witness in behalf of the defendants and was examined and testified further as follows:

Cross Examination

(Resumed)

Mr. Maguire: Before proceeding further with the cross-examination of this witness, the plaintiff now moves that there be [232] stricken from the record all testimony of this witness with regard to any negotiations had with Charlotte Deady or any conversations had with his counsel or Mr. Simon, after the death of Henderson Brooke Deady, with regard to any compromise settlement or claims between Charlotte Howell Deady and this witness and his brother, and all testimony with regard to his action or failure to act with regard to any offer of compromise or settlement based upon any alleged ignorance on his part that Charlotte Howell Deady was making any claim to a two-thirds interest in the fee to the property in question, on the ground and for the reason that neither the pleadings nor pre-trial order raise any issue with regard to any act or failure to act on the part of Charlotte Howell Deady, but are based upon, and solely upon, al-

(Testimony of Hanover Deady.)

leged actions and statements of Henderson Brooke Deady.

The Court: The position, as I understand it, in the pre-trial order is that the witness was **relying** upon statements of Henderson Brooke Deady and that there were certain controversies, of which the refusal of this offer was one, that therefore removed it from the case.

Mr. Maguire: My motion is not directed to that, your Honor, at all. As I say, the answer and the pre-trial order itself cover the question of any alleged estoppel or construction, contemporaneous construction, of the will, under the rights of the party, espoused by Henderson Brooke Deady. We objected as to the relevancy and competency of that, but that is plainly in [233] issue. But now what I am talking about is his statement and testimony heretofore given with regard particularly, for instance, to the fact that if he had known that Charlotte Howell Deady was making any claim to a two-thirds fee he would have signed the document, which is not tendered by the pleadings and not mentioned in the pre-trial order, and it, therefore, is not an issue. You see, the——

The Court: (Interrupting) Yes, I understand the distinction. I think that that testimony tends to rebut his claim of reliance upon the statements of Henderson Brooke Deady, if it does anything. I therefore think the testimony is competent. [234]

(Testimony of Hanover Deady.)

Mr. Maguire: Then all I can do is renew my motion.

The Court: Yes. The motion is denied.

Mr. Maguire: Now may I have those two letters, Exhibits 9 and 10.

Q. I hand you Exhibit 9 and ask you to examine the same. I might state, that is the original of the carbon copy which was handed you yesterday afternoon. Now, at that time the firm of Wilbur, Beckett, Howell & Oppenheimer and Mr. Ralph W. Wilbur were your counsel, were they not?

A. Yes, sir. [235]

Q. Now, Mr. Deady, on your direct examination you testified that at the time that you went to Mr. Wilbur and had him examine the will of Lucy A. H. Deady you did not understand or could not understand as to whether she was to continue to get the amount that he, Henderson Brooke Deady, was getting, or exactly what amount she was to get, or for how long. What doubt was there in your mind as to the length of time that she was to get anything?

A. Well, I didn't have any definite idea as to what the whole thing was. I was trying to find out when I went to Ralph Wilbur.

Q. Well, what question arose in your mind at that time as to the period of time in which Charlotte Howell Deady would be entitled to receive anything under the will?

(Testimony of Hanover Deady.)

A. Well, I don't really recollect, except that possibly it had to do with the ten-year period.

Q. In what regard? What do you mean by that, ten-year period? As to whether she could get it beyond the ten-year period?

A. Yes, as to whether she could get anything beyond the ten-year period. I suppose that is what I meant. Of course, I just went up to——

Q. (Interrupting) Of course, I am not interested in what your [238] supposition is, or was. I want to know what arose in your mind or what question arose in your mind or what you meant as to the ten-year period?

A. Well, my idea of the whole thing, as far as the ten-year period or not, was as to how much she was supposed to get, because Henderson died with a certain amount of money, and I didn't know whether she was entitled to two-thirds of the income, or whether she came into it, or anything about it. I was wholly at sea about it, and that is the reason I went to Mr. Wilbur.

Q. Yes, but that does not answer my question. What did you have in mind as to the length of time that she should be entitled to receive anything, and what did the ten-year period have to do with that?

Mr. Jaureguy: I object to that question on the ground that he has answered it, and counsel is——

The Court: (Interrupting) Objection overruled.

A. Well, as I have stated, as far as the ten-year period was concerned, I didn't know anything

(Testimony of Hanover Deady.)

about it. I—if I can answer it this way, I didn't know whether she was entitled, for how long a period, to receive six hundred dollars, or whether she was to receive any. I didn't know anything about it, the way the will read, and I was trying to find out about it. It wasn't a question in my mind as far as any particular period. I didn't even know whether she was entitled to anything, as far as that is concerned. I didn't know whether she was entitled to six months, [239] or eight months, or two-thirds, or anything. I was trying to find out, that is all. There wasn't anything definite in my mind, trying to take anything away from her. If she had something coming it was perfectly all right with me. That is what I was trying to find out.

Mr. Maguire: Well, didn't you raise any question at any time, or your attorney raise any question for and on your behalf, on the proposition that Henderson Deady, having died within the ten-year period specified in the will, that his widow—he could not exercise that power in favor of the widow?

A. Oh, no, there wasn't any question that he could not exercise the power. There was a question of how much and for how long. I didn't understand for how long. We talked those things generally over. I couldn't remember definitely. As far as that is concerned, we had conversations in Mr. Wilbur's office about it, and that is all I can recollect about it. I left it entirely up to him.

(Testimony of Hanover Deady.)

Q. Well, were you present at any conversation in Mr. Simon's office at which Mr. Maguire and one of your attorneys was present?

A. Yes, I recollect being there at one time in regards to these stipulations.

Q. Who was present, as you recollect?

A. Well, I recollect that you were there and I was there and Mr. Joseph Simon and Mr. Wilbur. That is my recollection of it. [240]

Q. Was Mr. Oppenheimer there?

A. I don't remember that. He could have been. I don't remember.

Q. Was Mr. Strong there?

A. I don't remember that. I don't remember him being there. He may have been. He could have been. I don't remember of him being there.

Q. Can you give us approximately the date of that conference?

A. No, I can't.

Q. Was it in the summer of 1933?

A. Well, it must have been in 1933 some place, because this took place after Henderson died. If I recollect, a date in '33.

Q. Well, these negotiations continued on until into 1935, didn't they?

A. On this particular stipulation?

Q. As to compromising the differences of anyone, the claims of right between Charlotte Howell Deady and yourself and your brother Matthew?

A. I wouldn't want to say the date. I know they

(Testimony of Hanover Deady.)

did continue for quite a while. I didn't realize they lasted that long.

Q. Well, at the conference held in Mr. Simon's office, at which you were present, did you hear anyone make any claim that Charlotte Howell Deady was entitled to receive none of the income?

A. No, sir, I did not, and if they did and they were representing me I certainly had no intentions of that fact at all, because it states in the will she should have a certain amount of income [241] for the rest of her life.

Q. Well, if the will says she should have income for the rest of her life, then how did any question arise in your mind as to the period for which she should receive anything?

A. Well, I am trying to tell you if I said that I was just trying to bring up the subject as to what she should get, or how long, and everything about it, according to the will. It wasn't with the idea of estopping what she was going to get.

Q. Do you remember either Mr. Oppenheimer or Mr. Wilbur claiming that under their construction of the will if Henderson Brooke Deady died within the ten-year period after his mother's death he could not exercise the power and his widow would be not entitled to any income?

A. I don't remember any such thing. I am not saying, Mr. Maguire, that they might not have said it, but I don't remember any such thing, because I had nothing in my mind like that.

(Testimony of Hanover Deady.)

Q. Now, with regard to Charlotte Howell Deady having made a claim or asserting—when I use the word “claim” I don’t mean putting anything in writing, but you now testify that you never heard from anyone that Charlotte Howell Deady was asserting that she owned a two-thirds interest in that property?

A. I heard a rumor that there was going to be, maybe, a test case to find out whether she did own it or not. I didn’t know that she was personally making any claim, but that is what I heard, that there might be a test case. [242]

Q. And when was it that you first heard that?

A. It was along in 1935, I believe, my best recollection of it.

Q. I want to ask you whether or not, prior to April 30, 1934—and I emphasize the year 1934, so we will have no mistake of it—you had not been informed that Charlotte Howell Deady might or would make a claim for a two-thirds fee simple in that estate?

A. I never heard at any time that Charlotte Howell Deady was going to make a claim for two-thirds of the property itself. I did hear rumors that there might be a suit brought. The fact of the matter is, I heard that you yourself had made a statement that it was too bad that Charlotte Deady died or there would have been a suit brought in this case by her.

Q. Now, I am referring——

(Testimony of Hanover Deady.)

A. (Interrupting) I don't know, Mr. Maguire, I wouldn't know the date, nor anywheres near it. I wasn't even——

Q. (Interrupting) Charlotte Howell Deady didn't die until 1935, did she?

A. That is correct.

Q. All right, now, what I am asking you about, and I will call to your attention directly, whether or not as early as April 30, 1934 you had not been apprised, apprised by Robert H. Strong, to the effect that Charlotte Howell Deady was contemplating or might make a claim for a two-thirds interest in the property itself?

A. That is who I heard it from, that there was probably going [243] to be a test case in this by Charlotte—that the attorneys were trying to make a test case about it. What year it was I don't know, but it was during her lifetime.

A. Oh, yes.

Q. And the question was as to whether or not she had a two-thirds interest in the estate, in the property?

A. Well, naturally, that is what she was bringing it for if she brought one; but let me add this, I also understood her to say that she understood what Grandmother Deady wanted and she wouldn't bring such a suit, by Mr. Strong.

Q. I am asking you about your conversation with Mr. Strong. And he told you that prior to April 30, 1934?

(Testimony of Hanover Deady.)

A. Oh, yes. I wouldn't say the date, but I know he told me that.

Q. That was before Charlotte died?

A. That is correct.

Q. And while the negotiations for compromise were going on?

A. Well, I didn't know that they extended to 1935, but if they did I naturally——

Mr. Maguire: (Interrupting) Mr. Bailiff, may I have the exhibit—well, here it is.

Q. Well, I will ask you this question: Wasn't it prior to the second of November—the 22nd of October, rather, 1934?

A. I wouldn't answer that directly. If the records show it, it must have been. I am not saying it isn't, Mr. Maguire. [244]

Q. Wasn't it prior to the time that you declined to sign Defendants' Exhibit G?

The Court: Does the witness know these by numbers? Will you present the document to him.

Mr. Maguire: (To the Bailiff) Will you present the document to him.

A. Now, what was the last question, again?

Mr. Maguire: Q. Didn't Mr. Strong inform you, prior to the 22nd day of October, 1934, that Charlotte Deady was asserting a claim to an undivided two-thirds interest in this property?

A. Well, the answer would be that, personally, of my own knowledge, I don't remember. If this shows that he did, why, naturally that is true. I

(Testimony of Hanover Deady.)

was in and out all the time, I was working, I was busy; I can't remember all those things. If you have got records to show that that is true, why, it is true.

Q. You will not say whether it is true or not?

A. I don't remember.

Q. It is a matter of fact, however, that prior to the time these negotiations for compromise blew up Robert Strong had informed you that Charlotte Howell Deady was asserting a claim to a two-thirds fee simple estate or title in this property?

A. Mr. Bob Strong informed me that there might be a test case, and that is all that I know of. Now, of course, I assume that Charlotte was the one bringing the test case, there is no question about that, but that is the way he expressed it to me. [245]

Q. But that was before the negotiations for compromise blew up, wasn't it?

A. Well, to my best recollection, I think they were.

Mr. Maguire: That is all, thank you.

Redirect Examination

By Mr. Jaureguy:

Q. Now, I want to get this straight. You said that Bob Strong also told you something further about Charlotte's position, and what was that?

Mr. Magnire: No, just a moment,—the witness didn't say that Bob Strong said that.

The Court: Oh, yes. Yes, he did, Mr. Maguire.

(Testimony of Hanover Deady.)

Mr. Maguire: I beg your Honor's pardon. I thought I listened very carefully to that. He said he had also heard, but I didn't understand him to say Mr. Strong said that.

The Court: You refer to the record. He said Mr. Strong told him.

Mr. Maguire: Well, I certainly didn't get it that way.

Mr. Jaureguy: Q. Now, you give that whole conversation, now.

Mr. Maguire: Well, we object to that as being irrelevant, immaterial and incompetent, because it is not competent to prove, in view of his testimony on direct examination in which he said that he had never heard of any such claim, to prove that he had heard of such claim. Now, what he said about other matters [246] isn't relevant and material.

Mr. Jaureguy: Well, of course, on other matters entirely, but you can't cross-examine a witness on a conversation without allowing the whole conversation on that subject matter to be brought in, and that is what we are entitled to do and that is what I am asking him for.

The Court: He may answer.

A. My recollection of that is that Mr. Robert Strong told me that there would be a test case, or there was some talk of a test case being brought by attorneys in the East against the estate, and they had tried to prevail upon Charlotte Deady and she

(Testimony of Hanover Deady.)

mentioned the fact that she wouldn't do it, because she knew what Grandmother Deady's intention was with regards to the will, she was only entitled to have the income.

Mr. Jaureguy: Q. Now, at the time that Paul Deady died was he living with his wife?

A. He was not, no, sir.

Q. Can you give us an approximation of how long they had been living separate?

A. No, I can't, except that she had filed a divorce proceeding in California and hadn't taken out an interlocutory decree. It was over a period of—I wouldn't want to say. It was several years, at any rate, they hadn't been living together.

Q. And prior to his death she had filed these divorce proceedings, you say? [247]

A. Beg your pardon?

Q. And prior to his death she had filed these divorce proceedings, you say?

A. Prior to Paul's death?

Q. Yes.

A. No, my understanding was that she didn't file any—oh, yes, prior to his death she had made these divorce proceedings. Is that what you said?

Q. And she had been living away from Portland how long, approximately?

A. Oh, quite a while. I wouldn't want to say. I think as high as ten years, if I remember.

Q. You spoke about a Miss Brown, a nurse, being present at the Alexandra Court, some of the

(Testimony of Hanover Deady.)

times that you spoke to your grandmother. Do you know anything about Miss Brown's whereabouts now?

A. Yes, the last I remember she was convalescing in a hospital at Salem.

Q. And what was the nature of her illness?

A. Well, I understood, a nervous breakdown.

Q. That is, mental trouble of some kind?

A. Yes, that is what I understand.

Mr. Jaureguy: I am going to ask a question that I asked on direct, and I believe it becomes competent on account of the cross-examination. I want your Honor to know I am not trying to [248] slip it over.

Q. Now, when you went down to Joseph Simon's office immediately after, or as soon after, the death of Henderson Brooke Deady, I wish you would state what Joseph Simon told you.

Mr. Maguire: Object to that as being wholly incompetent, irrelevant and immaterial. I haven't inquired of this witness as to any conversations he had with Joseph Simon.

Mr. Jaureguy: Well, he has inquired of this witness as to the ideas that he got with respect to the income to be paid, and that he examined the will, and I think we are entitled to show the source where he got these ideas that he later communicated to Mr. Wilbur, if he did.

The Court: Well, as I understood the theory of

(Testimony of Hanover Deady.)

this, it was that he got his ideas from Henderson Brooke Deady.

Mr. Jaureguy: No, that's the ideas on the ownership of the property. We are talking now about the ideas of the widow getting an income after his death and why he went to see Mr. Wilbur and started in this correspondence that they have put in evidence here. We don't claim anything from Mr. Simon about the ownership of the property,—I mean in this respect, with respect to this conversation, we don't—but it is an entirely different subject, and that is the income that he raised the question about.

The Court: Well, I think it is opening up a large question, but I will permit you to inquire, subject to cross-ex- [248½] amination.

Mr. Jaureguy: Q. What was said on that?

The Court: I don't want anything except relating to this particular subject.

Mr. Jaureguy: That is right.

The Court: I want the witness to understand that.

Mr. Jaureguy: That is right. That is, relating to the subject of the income that was being sent—

Mr. Maguire: (Interrupting) May it be understood that our objection will run to this course of testimony, without the necessity—

The Court: (Interrupting) Yes.

A. This was, of course, at a time shortly after Henderson died, as I understand your question—

(Testimony of Hanover Deady.)

Mr. Jaureguy: (Interrupting) Yes, that is right.

A. (Continuing) —and I went down to see Mr. Simon, just in a general way, just to talk to him about the general situation, and in our conversation there he made the remark that they were getting too much money back there, which I took, of course, to be both Amalie and Charlotte Deady, and I didn't know really what he meant and I asked him what we should do about it, and he said, "I can't do anything, Hanover. I am the executor of the will. You will have to see somebody else"—and so that was what started my train of thought. I didn't even get what he meant, and that is the reason I went to Ralph Wilbur, to find [249] out just exactly, after I had looked over the will and kind of wondered what it was all about.

Mr. Jaureguy: That is all.

Mr. Maguire: I now move to strike the testimony of this witness as to the conversation this witness had with Joseph Simon, and particularly with regard to what Joseph Simon said his thoughts and opinions were, as being wholly immaterial, irrelevant and incompetent in this case, and not binding upon plaintiff, not tending to prove or disprove anything in this case, purely hearsay, but not within any exception to the hearsay rule.

The Court: The theory on which this testimony is admitted is the extent to which the witness placed a reliance on the statements of Henderson

(Testimony of Hanover Deady.)

Brooke Deady and whether or not, as I understand it, he did rely on them to the extent of taking other positions that he would not have taken under other circumstances. I think that the statement of Mr. Simon is not of weight otherwise than that, except as to the effect it had on the mind of the witness.

Mr. Jaureguy: That is the entire purpose of it.

The Court: Yes. So, therefore, I——

Mr. Jaureguy: (Interrupting) In offering it, I did it on the assumption that it was not admissible on direct, because your Honor ruled it out; it was only admissible on account of what was brought out on cross examination, and on cross examina- [250] tion he tried to get this witness to say that he had certain definite theories, right down to the very dollar, and in order to show what the state of his mind was and the source of his information, otherwise the inference might be drawn that Mr. Simon went and laid out an entire plan and his whole theory, and I wanted to show just exactly what he said, because this counsel attempted to get the witness to say right down to a dollar and the year and the amount of money. That was the only purpose of it, and it was entirely on account of this cross-examination.

Mr. Maguire: May it please your Honor, the question was asked on direct examination about some testimony given, and my cross examination of this witness was limited to that particular matter.

(Testimony of Hanover Deady.)

Mr. Jaureguy: I am not questioning the propriety of the cross-examination at all.

Mr. Maguire: I am not suggesting you are.

The Court: I will settle this. I will deny the motion.

Mr. Maguire: It is now twelve-thirty. I may say to your Honor that I only have one more question I want to ask on recross. Unfortunately, however, it must be based upon the transcription of a shorthand note I made of an exhibit hurriedly last night. It will take me a moment or so to get it out so I can read it accurately. I am willing to do it now, if your Honor will give me just a moment, or I can do it afterwards.

The Court: No, we might as well do it now. [251]

Mr. Maguire: It won't take me but a moment.

Recross Examination

Q. Now, I want to ask you further with regard to the conversation had with Robert H. Strong a few days prior to April 30, 1934. I ask you whether or not you did not say to him, in substance and effect, that you were disturbed about the possibility of Mrs. Deady laying claim to two-thirds interest in the property, and at that time did not Mr. Robert Strong say to you that such was very likely to be the case, or words of like tenor and effect?

A. I never made any such statement as that. My testimony is that he did tell me at one time—I am not trying to say the date, or when it was; it was up in his office—that there would be—that Charlotte

(Testimony of Hanover Deady.)

Deady's attorneys were trying to get a test case; she wouldn't listen to it, because she knew what Grandmother Deady's intentions were.

Q. And was that all the conversation?

A. The whole conversation. My recollection of it was of the income, and Mr. Strong told me, then and there, that Charlotte Deady was entitled to two-thirds of the income of that estate, under the will, he was going to see that she got it. I remember that part of it. The fact of the matter is, the whole argument was on the income, as I remember it, and then just telling me about this test case might come up.

Q. Was there anything said by you as to whether or not Charlotte Howell Deady's heirs, when she died, might make claim to a two- [252] thirds interest in the estate?

A. I have no recollection of it at all. I am sure there didn't.

Q. You are sure it didn't?

A. Pretty sure there didn't. I have no recollection of it at all.

Mr. Maguire: That is all, thank you.

Mr. Jaureguy: That is all.

(Witness excused.)

The Court: Suspend until two o'clock.

(Whereupon, at 12:30 o'clock P. M., Thursday, January 23, 1941, a recess was had until 2:00 P. M.)

[253]

AFTERNOON SESSION

2:05 P. M.

Mr. Freed: We will call Miss Murch.

JESSIE MURCH

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: Please state your name.

A. Jessie Murch.

The Clerk: Spell the last name.

A. (Spelling) M-u-r-c-h.

(The witness was then duly sworn.)

Direct Examination

By Mr. Jaureguy:

Q. Miss Murch, where do you live?

A. I live at the Alexandra Court Hotel.

Q. And you have lived in Portland for some time, have you?

A. Many years.

Q. Now, were you related to Mrs. Lucy A. H. Deady?

A. Mrs. Deady was my aunt, my mother's sister.

Q. And were you acquainted with her during her lifetime?

A. Oh, I lived with her many years.

Q. And could you tell us when you lived with her?

A. It was in the fall of 1893, I think, that I went to live with Mrs. Deady, after Judge Deady's death.

(Testimony of Jessie Murch.)

Q. And how long did you live with her? [254]

A. Well, we were in the same apartments some six or seven years.

Q. And after that—

A. (Interrupting) And after that, at two or three different times, I lived in the same hotel, but not in the same apartments.

Q. And what hotel was that?

A. It was—then it was known as the Hobart-Curtis. It was where—it is now The Jeanne d'Arc.

Q. And could you tell us about when you and she lived at the Hobart-Curtis?

A. Well, I lived with Mrs. Deady at that building over here which was then known as The Hill, and later it was changed to The Hobart-Curtis.

Q. That is, is that where you were living from 1893 for six or seven years, when you say you lived with her? A. Yes.

Q. And thereafter in the same building but in different apartments? A. Yes.

Q. And how long did that continue?

A. Oh, several years; three or four, I think.

Q. And then thereafter where did you live?

A. Thereafter I went to the Alexandra Court in May of 1922, and I lived there—I am still living there, but I was there at the time Mrs. Deady died.

Q. And where did she live during that time? [255]

A. She lived at Alexandra Court, in another apartment.

(Testimony of Jessie Murch.)

Q. Now, during that period after you ceased living in the same apartment together did you see her? A. Oh, I saw her very frequently.

Q. Could you give us some idea about how frequently?

A. When I went to Alexandra Court, after I went there in 1922, I was pretty near—I practically went to see my aunt every day.

Q. So I take it, then, that at least from 1893 on you saw your aunt very, very frequently?

A. Yes.

Q. And were you acquainted with her children?

A. Oh, yes.

Q. And who were they?

A. Well, Ned,—Edward Deady, and Paul, and Henderson.

Q. And with her grandchildren? A. Yes.

Q. You were acquainted with them, too, you say? A. Yes.

Q. Now, at any time during the time from 1893 on did Mrs. Deady, Mrs. Lucy Deady, your aunt, ever discuss with you how she desired or intended to have her property go after her death?

Mr. Maguire: Object to that as being incompetent evidence to prove any issue in this case, either to prove intent—or further incompetent as it is not receivable to vary, alter, or [256] to construe the last will and testament of the testator, Lucy A. H. Deady.

(Testimony of Jessie Murch.)

The Court: This is a preliminary question. She may answer this question.

A. Yes, Mrs. Deady——

Mr. Jaureguy: (Interrupting) I think you may answer it Yes or No.

A. Yes.

Q. And could you give us an idea as to the time, say the first time that she discussed that?

Mr. Maguire: May we have the same objection?

The Court: She may answer.

A. Well, all through the years she spoke of the property going to her grandsons eventually.

Q. Well, I mean at the time. Now, I wish you would state——

The Court: (Interrupting) That last answer is stricken.

Mr. Jaureguy: Except the part “all through the years”.

The Court: Well, the whole answer is stricken. Proceed and ask her again.

Mr. Jaureguy: Q. The question that I would like to have you answer, as nearly as you can, Miss Murch, if you can remember about when the first time that she began talking on that subject was?

A. Well, I don't know that I can remember exactly the first time, but she frequently spoke of her desire for it to go to Hanover—— [257]

The Court: (Interrupting) Just a moment, please. Just confine your answer to time.

(Testimony of Jessie Murch.)

Mr. Jaureguy: Q. We are asking for the time.

A. Yes.

Mr. Maguire: We move that the answer that she made be stricken.

The Court: Well, I don't think there was any. I think I stopped the witness in time.

Mr. Jaureguy: Q. Well, now, you started to live with her in 1893. Could you give us an idea how long after that, or any way you can fix, perhaps, the first time that she spoke about it, if it is possible for you to do it?

A. I don't think it is possible for me to fix the time, after so many years.

Q. Nor even the approximate time? A. No.

Q. Now, I wish you would tell us what she said on those occasions.

Mr. Maguire: We object to this question on the ground that it is wholly incompetent to prove or disprove any issue of this case, that it is hearsay, it is incompetent, because the testamentary intent of the testator may not be proved by oral testimony, nor can a will be construed by oral testimony as to what the testator may from time to time or at any time have said with regard to intent or desire. [258]

The Court: Do you wish to argue at some length now?

Mr. Jaureguy: Well, it would be rather an extended argument. Some of the evidence has already gone in. I would say if we can defer it until some later time,——

(Testimony of Jessie Murch.)

The Court: (Interrupting) The evidence is rejected. It may be put in the record under the rule. I think I have ruled each time definitely on that.

Mr. Jaureguay: No, I did not so understand. I understood that you reserved ruling on it.

The Court: Well, this question I don't think I am in much doubt on. You may make an argument on it, if you wish. I think I ruled on the previous evidence on this particular question before definitely.

Mr. Jaureguay: You mean rejecting it and putting it in under the rule?

The Court: Yes.

Mr. Jaureguay: Well, the argument that I make will be more extensive than what I have in the books here.

The Court: Well, you said, Mr. Jaureguay, that you wanted to argue the question. Now, I will do either way you wish. If you want to argue it, I will reserve ruling until you argue it.

Mr. Jaureguay: Well, I would prefer that, although I will say that on just a few moments notice, if your Honor desires to have argument, I will be glad to do that. But I would prefer that you reserve ruling until later. [259]

The Court: Then the evidence will go in subject to the objection. I will rule later.

Mr. Jaureguay: Q. Now, do you remember the question, Miss Murch?

A. You asked me the first time, if I could re-

(Testimony of Jessie Murch.)

member the first time that Mrs. Deady said this to me.

Q. Since you answered that question, do you have a different answer? Do you recall the first time? A. No.

Q. The question now is, state what was said on these various occasions.

Mr. Maguire: I take it that it is not necessary for me to renew my objection.

The Court: No.

Mr. Maguire: That we may have a running objection with regard to any statements with regard to intent, testamentary intent, or disposition of the property.

The Court: Yes.

A. Well, I don't know that I could say——

The Court: (Interrupting) Any declaration of the testator.

Mr. Maguire: Yes.

A. Well, Mrs. Deady expressed the opinion that the property would eventually go to Hanover and Matthew.

Mr. Jaureguy: You say she frequently expressed that opinion?

A. Yes, that was it. [260]

Q. Now, do you remember when Paul Deady died? A. Yes.

Q. Now, would you say whether or not she expressed that opinion prior to his death?

A. Yes.

(Testimony of Jessie Murch.)

Q. Did Paul Deady ever have any children?

A. Not any.

Q. And after his death did she ever express herself?

A. Yes.

Q. And after his death what did she say?

A. She said it was between—may I say this, that it was between May, 1922 and sometime before her death in 1923 that she said to me that eventually the property would go to Hanover and Matthew.

Q. Now, did she ever express any expression of feeling that she might have with respect to Hanover and Matthew, or either of them?

A. Oh, yes.

Q. What did she ever say along that line?

A. She showed a great deal of interest and affection for her grandsons.

Q. And did she ever talk to you about them?

A. Oh, yes.

Q. And can you give us, just generally, the subject matter of those conversations? [261]

A. Well, that was the trend of it, that she was extremely interested in them and in their future.

Q. And could you tell us about how far back those conversations went?

A. Well, from 1893 on, when the children were little.

Mr. Jaureguy: You may take the witness.

Mr. Maguire: No cross-examination.

Mr. Jaureguy: That is all, Miss Murch.

(Witness excused.)

Mr. Jaureguy: We will call Miss Catlin. [262]

BLANCHE CATLIN

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: Please state your name.

A. Blanche Catlin.

The Clerk: Blanche Catlin?

A. Yes.

The Clerk: Spell the last name, please.

A. (Spelling) C-a-t-l-i-n.

(The witness was then duly sworn.)

Direct Examination

By Mr. Jaureguy:

Q. Miss Catlin, you live in Portland?

A. No, I live in Seaside.

Q. And did you ever live in Portland?

A. I lived in Portland most—except seven years of my life. I have lived in Seaside that time.

Q. And those seven years were when?

A. From '34 to '41.

Q. And prior to that time you lived in Portland during your entire life? A. Entire life.

Q. Now, were you in any way related to Mrs. Lucy A. H. Deady?

A. I was her niece. She was my mother's sister.

[263]

Q. And what relation are you to Miss Murch?

A. Cousin.

Q. And you were acquainted with Mrs. Deady, in addition, were you? A. With Mrs. Deady?

(Testimony of Blanche Catlin.)

Q. Yes.

A. Yes, indeed. I lived with her for several years.

Q. And can you tell us when it was that you lived with her?

A. I lived with her at Alexandra Court from—well, it was during the war. It was either '17 or '18, I think, that I moved there, until '20 or '21. I moved away from Aunt Lucy soon after Paul died.

Q. I see.

A. Of course, she had to have a companion. And then I had lived with her before that, at the Hobart-Curtis, Virginia Hill.

Q. And can you tell us about when it was that you lived with her before that?

A. It was 1913, I am very sure,—it might have been 1912; I think it was 1913—until I moved to the Court.

Q. Did you move together, you and Mrs. Deady?

A. Yes.

Q. So you lived, then, with her from '13—

A. (Interrupting) I had been living with her before.

Q. So you lived with her from about 1913 until—

A. (Interrupting) Until we moved to the Court, which was in [264] 1917 or '18, I am not quite sure which.

Q. And at Alexandra Court did you live with her?

A. Yes.

(Testimony of Blanche Catlin.)

Q. So then was that continuous—you lived with her from about 1913 until about 1920 or '21?

A. Yes.

Q. During the time that you lived with her was Miss Murch also living with her?

A. No, she wasn't living with her at that time. She had lived with her before.

Q. Now, during any of this period of time when you were living with her did she ever discuss with you what she wished to have done with her property after her death?

A. I remember—

Mr. Maguire: (Interrupting) Pardon me—just a moment—May we interpose the same objection to this line of testimony that we did to that of the preceding witness, to any declarations or statements by Lucy A. H. Deady with regard to her property, disposition of her will or any provision?

The Court: Yes, any declaration of testamentary purpose.

A. I didn't understand that.

Mr. Jaureguy: Q. Well, you mean you didn't understand the question, or what?

A. Was there anything for me to answer?

Q. Yes. [265]

A. I didn't hear what he said.

Q. You may answer the question,—that is the result of it.

A. Oh, the question that you asked me?

Q. Yes.

(Testimony of Blanche Catlin.)

A. Yes, she did, definitely, at one time. Of course, I heard her insinuate the same thing many times, but one time definitely, after Matthew had been there, he left——

Q. (Interrupting) I wonder, before you tell us, if you could tell us when that would be?

A. This was at the Alexandra Court.

Q. If you could fix the time, about the time?

A. Oh, I don't know what time, but it was some-time between 1917 and 1920.

Q. Yes. All right, you may proceed and tell us.

A. And after Hanover had gone she said, "Well, that is where I certainly want my money to go, to those two boys", and that is the only time I ever remember of her saying definitely anything like that.

Mr. Jaureguy: Now, I wonder if I could have the first part of the answer. I think there was a little inconsistency there. I am not sure of it.

The Court: Yes; she said Hanover at one time and Matthew another.

Mr. Jaureguy: Yes, that is it. Now, was that after Hanover had been there, or after Matthew had been there? [266]

A. Matthew.

Q. Did she ever talk about this property where formerly was her home?

A. Yes, she often talked of it.

Q. Is that the property down at——

(Testimony of Blanche Catlin.)

A. (Interrupting) That is the property that she owned at the time of her death.

Q. Down at Broadway and Alder Street?

A. Yes.

Q. And what did she say about that?

A. Well, I don't know. It had been so long since she had lived there that she just talked of it as property that she expected to make her—that she expected to have to leave to her children.

Q. Well, did she say anything about where she wanted that property ultimately to go?

A. Yes; that is really the only property she had, I think.

Q. And what did she say about it?

A. That that is the property she wanted to go to her grandsons eventually.

Q. Now, was that said once or on more than one occasion?

A. That is the only time that I ever heard her say it definitely, although she insinuated it all the time.

Q. Well, I wonder if it would be possible for you to give us the statements she made that you say insinuated, or could you [267] do that?

A. Oh, I couldn't recall anything else.

Q. Now, did you know Henderson Deady?

A. What was it?

Q. Did you know Henderson Deady?

A. Yes, I did know him. We grew up together.

(Testimony of Blanche Catlin.)

Q. And during this time that you were living with your aunt where was Henderson?

A. Well, of course, Henderson wasn't living in Portland that time. He moved away from Portland when he was a very young boy.

Q. And was he living here any of that—I mean after he moved away when he was a young boy, did he ever move back to live here?

A. He never visited here while I was with Mrs. Deady, no, as far as I remember now.

Q. So that during the time you were with Mrs. Deady you don't recall ever having seen Henderson, is that——

A. (Interrupting) No, he didn't come out very often; very seldom.

Q. I am sure I——

Mr. Maguire: I move that that be stricken as unresponsive, the question of whether she saw him.

The Court: I think it is all right. You can develop that by cross-examination, if you wish.

Mr. Jaureguy: Q. Prior to 1913 had you ever lived with Mrs. Deady? [268]

A. I had never lived with her, except as she had lived at our house once for a few years, soon after Judge Deady died.

Q. Was that immediately after Judge Deady died, or was that some other time? I didn't quite get when she lived with you the first time.

A. It was after Judge Deady died. I don't know how much after. It was before 1920, I know—no, it

(Testimony of Blanche Catlin.)

wasn't, either, it was after 19—I am confused. I don't know.

Q. Yes.

A. I can't remember whether it was before my father died or not.

Mr. Jaureguy: I see. You may take the witness.

Cross-Examination

By Mr. Maguire:

Q. I understood you to say, Miss Catlin, that Dr. Henderson Brooke Deady had moved away from Portland when he was a very young man?

A. Yes, he went when he was just in his boyhood, really. He went to a preparatory school in the East.

Q. And from 1913 until 1922 did I understand you to say he never came back to Portland?

A. As I remember it, he did not, although he may have. I wouldn't be sure of it. He was—let me see—no, I don't remember his ever being out here during that period, but, as I say, I am not positive about it.

Q. Do I understand you to testify that he did not see his mother [269] any time from 1913 until the time of her death?

A. No, he was out here after I left Mrs. Deady. No, let me see—just before I went to Mrs. Deady's, I guess.

Q. Well, you went there in 1913.

A. I went there in 1913, and I think it must

(Testimony of Blanche Catlin.)

have been about 1909 or 1910 that he was out, but I can't give the dates exactly. I just remember where I was living at that time.

Q. Well, let me ask you this question: Am I correct in understanding you to say that you don't know that he ever saw his mother from 1913 until 1922?

A. Not to my knowledge, but I—no, I can't swear to that, because I may be mistaken on it.

Mr. Maguire: I see. That is all, thank you.

Mr. Jaureguy: I think that is all.

A. Is that all?

Mr. Jaureguy: Yes, that is all, thank you.

(Witness excused.)

Mr. Jaureguy: Call Mrs. Ariel Deady. [270]

ARIEL DEADY

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: Please state your name?

A. Ariel Deady.

The Clerk: Spell the first name.

A. (Spelling) A-r-i-e-l.

(The witness was then duly sworn.)

(Testimony of Ariel Deady.)

Direct Examination

By Mr. Jaureguy:

Q. Your name is Mrs. Ariel Deady?

A. Yes.

Q. And you live in Portland? A. Yes.

Q. And you have lived here about how long?

A. Well, I have lived here since 1900.

Q. And your husband's name is what?

A. Hanover Deady.

Q. That is one of the defendants in this case?

A. Yes.

Q. And you and Hanover have been married how long?

A. We were married in June, 1925, the first day.

Q. Now, how long had you known him before that?

A. Well, I met Hanover the first year I went to high school, [271] and I think it was in 1910, '09 or '10.

Q. And were you acquainted with his grandmother, Lucy A. H. Deady? A. Yes, I was.

Q. And when did you first become acquainted with her?

A. Well, I couldn't say exactly, but think possibly I had known him about two years the first time he took me to see her.

Q. And when was that?

A. Well, I would say that it was in '12 or '13.

Q. In '12 or '13 you first met——

(Testimony of Ariel Deady.)

A. (Interrupting) Yes. The reason I can say that, it was at that time that I went away from home to teach school, in September of 1913, and I had been to see her before that, because I corresponded with her while I was teaching school in Eastern Oregon.

Q. Were you teaching school in 1913?

A. I started teaching school in 1913, right out of high school, when I graduated from high school.

Q. Then I wish you would tell us about your acquaintance with Mrs. Deady, his grandmother, about how well you became acquainted with her.

A. Well, she was living at the Hobart-Curtis, I believe it was called, when I first met her, and Hanover took me the first time one evening to see her, and I was rather young and I was very nervous, because she seemed like a very fine old lady and [272] I was afraid I might not appear just as nice as she might think I should, but she made me feel so at home immediately and was so sweet to me that I became very much attached to her on my first acquaintance. But I don't remember of seeing her but more than once or twice before I went away to Eastern Oregon to teach school, but every year when I would come back in the summer or at Christmas time I would go to see Mrs. Deady, and often I would be invited to have a bite to eat with her on Wednesdays and Sundays, and on Christmas one time she invited Hanover and I. She loved to hear about the outside world, and she kept herself very

(Testimony of Ariel Deady.)

modern and had very modern ideas, and it was very interesting to talk to a lady of her years that kept up with everything, and I was very, very fond of her.

Q. Now, you were married the first of June, 1925. I wonder if you could tell us about how long you were engaged prior to that time?

A. Well, we talked about getting married from the time we were in high school together, but, you know how it is, you are off and on. Hanover was in the navy for a few years, and I was away teaching school a few years myself; when he was home I wouldn't be home, because I took extension work in California; so our romance was rather sketchy those two years; but after he came back from the Navy in 1919 and I came back from Eastern Oregon where I was teaching we decided fully then that we would be married. [273]

Q. Did you ever discuss that matter with Mrs. Deady?

A. Well, I didn't know that Hanover had told her that we were to be married, because I was working at the time and I wasn't ready just then to be married, nor was he, but one time when I was up there with him visiting her she asked me if—she asked Hanover to run out and buy some ice cream, and Miss Brown, who usually was there with her, was in the other part of the house, and the minute that Hanover left she called me to her, and she had a very cute little way of, when she wanted to get

(Testimony of Ariel Deady.)

you down, putting her hand on you; she said, "Ariel," she said, "Hanover tells me that you are thinking of being married, but," she said, "I am very eager that Hanover finish his law course that he started before he went in the Navy." She said, "You aren't thinking of being married right away?" and I said, "Oh, no", that my mother was alone, and my sister and I, and that we just had planned to be married. Then she said, "Well, I do hope that you will encourage him to finish his law course." She said, "It means a great deal to me. I am very fond of my two grandsons, and I was so pleased when he started to study law that I hope you will——"

Mr. Maguire: Just a minute, Mrs. Deady, please. We object to the matter of any conversations had, on the same grounds and for the same reasons as the other witnesses on the same line of testimony.

The Court: Ruling is reserved, and the same direction. [274]

Mr. Jauregui: Q. You may proceed, then.

A. So I told her, I assured her, that I wasn't thinking of being married and that I would encourage him to go to law school, that I was just as anxious as she was to have him succeed and make something of himself; and she told me then that some day—that they owned this piece of property that had been her old home and that she hoped that some day it would be more valuable than it was, and that the boys eventually would be the owners

(Testimony of Ariel Deady.)

of that property, but she said it wasn't good for boys, if they were too young, to have too much money, but she did think that as long as it might be valuable some day and that they would be the owners of it that they should know how to take care of it and she thought maybe Hanover's law course would help him. And she also spoke to me of some other matters, of my own family. Hanover had taken a book of my father's family tree up to her to assure her that I was the right kind of a person, and she spoke to me at length of the book and seemed very pleased about it. And she also told me, "You know, Ariel, if you are going to marry a young, struggling lawyer it isn't going to be very easy." She said, "I married Judge Deady and," she said, "I think a wife has a great influence on a man and on his business." She said, "I went down to Medford with him and helped him to some of the great things he did." And she also told me, "You know, a judge doesn't make much money." She said, "All that comes to him in his life is the honor that he gets from sitting [275] on the bench and the good that he does." And she told me that she didn't have anything, not very much, to leave as a monument to Judge Deady, but she did hope that the boys would never sell the property or divide it up in any way.

Q. Why not?—Pardon me—Did she say why not?

A. Well, she told me that she thought that as

(Testimony of Ariel Deady.)

long as it stood there and was in the family that it would be a monument to Judge Deady.

Q. Now, did Hanover then resume his law course?

A. Yes, he did. That was the only time that she really ever came out and spoke of the property to me, but often when I was up there she would pat Hanover and myself on the back when we were going out and saying that the early years might not be easy but that later on she thought things would be very easy for us.

Q. Now, do you remember when Mrs. Deady died? A. Yes; she died in 1923.

Q. You recall the incident? A. Yes, I do.

Q. Now, did you ever know Henderson Deady?

A. Yes, I did.

Q. And, first, I will inquire whether you recall of him coming out here before Mrs. Deady's death?

A. Yes, he was here several weeks before Mrs. Deady died.

Q. Now, after Mrs. Deady's death did you ever have any conver- [276] sation—or did you ever see Henderson Deady?

A. Oh, yes, Henderson was very friendly with us. I wasn't married to Hanover at that time, but I was working at the Johnson Piano Company, on Sixth Street, and Henderson would often drop in there and I would play some music for him and talk with him, and one time he came in and asked me to go to lunch with him, which I did. He knew Han-

(Testimony of Ariel Deady.)

over and I were to be married, but it was before we were married.

Q. And this was after Mrs. Deady's death?

A. Yes.

Q. Did you have any conversation with him at that time about the property that Mrs. Deady left?

Mr. Maguire: Object to that on the same grounds and for the same reasons; further, that statements of Henderson Brooke Deady, either before or after his mother's death, would not be competent, to prove any issue in this case, to establish, one way or the other, the testamentary intent and construction of the will or to diminish or deprecate any estate or interest which he had in the property under the will.

The Court: Received in the record, under the same conditions; ruling reserved.

Mr. Jaureguy: Q. Now you may proceed, Mrs. Deady.

A. Well, what was the question?

Q. I asked you whether he had any conversations with you with respect to the property that Mrs. Deady had left, but I will ask [277] you, also, whether he had any conversations with you with respect to the income, either or both of those subjects?

A. Well, as I remember it, this one particular day when I went——

Mr. Maguire: (Interrupting) It may be understood that our objection goes to this line of questioning, income as well as property?

(Testimony of Ariel Deady.)

The Court: Yes.

A. This one particular day when he took me to lunch we went to the Hazelwood, and he took me past the property on Broadway and Alder that is in question in this suit and he stopped and looked at it and talked about it, said that the property would be more valuable as years went on, and he talked around about different things, about the income would be more because the property would be more valuable, and he—I can't say just exactly what his words were, but he gave me to understand that Hanover and Matthew owned the property, unless he had children, and that he was married and his wife wouldn't give him a divorce and that he never expected to have children. Laughingly, he said that "possibly some day", but that he hoped that wouldn't be for a long time, and he didn't expect that it would, and he laughed and sort of joked.

Mr. Maguire: I didn't get that last. Will you read it, Mr. Reporter.

(The latter part of the foregoing answer was then read.) [278]

Q. Can you tell us about when that conversation took place?

A. Well, it was—I think this was sometime during—in fact, I know it was after his mother's death, when he was out here, before he went East. Now, I couldn't say when it was when he went East. After we were married. He was at our wedding, and

(Testimony of Ariel Deady.)

he went East after we were married, but it was before I quit working at Mr. Johnson's, and I quit working a month before we were married, so it was sometime between his mother's death—I saw him quite frequently. In fact, at one time he had a picnic supper for us up on the property that Grandmother Deady did leave to him, that belonged to the family, up on Willamette Heights, or Macleay Park, somewhere up in there.

Q. You say that was more than a month before you were married?

A. Yes, I know it was. It was while I was working at Johnson Piano Company.

Q. Can you identify the time a little more definitely?

A. No, I couldn't, but I know it was in there between those times sometime.

Q. Now, did he ever talk to you about the income that he was getting?

A. No, I don't believe he ever did.

Q. You have related this time that he took you up by the building. Was that by the building, or through the building?

A. No; he came to the Johnson Piano Company and he took me to the Hazelwood for lunch, and we walked past there and he stopped [279] and talked. The family always seemed to be proud of the fact that that was the old home. Hanover—I had heard him talk about it.

(Testimony of Ariel Deady.)

Q. Was that the only occasion, or did he ever talk to you any other time about it?

A. Well, he was at our house frequently and I often heard different things, heard them talk about the property, but I wouldn't want to say just anything definite he said, because that stood out in my mind because I thought he was taking me to lunch—he asked me lots of questions about other things, and I thought he was sizing me up, and I think he was, because I heard afterwards—

Q. (Interrupting) Well, I don't care what you heard afterwards. You may take the witness.

Mr. Maguire: No cross-examination.

(Witness excused.)

Mr. Jaureguy: Mrs. Hansen. [280]

HELEN HANSEN

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: State your name, please.

A. Mrs. Helen Hansen.

The Clerk: Spell the last name, please.

A. (Spelling) H-a-n-s-e-n.

(The witness was then duly sworn.)

Direct Examination.

Q. Mrs. Hansen, do you live in Portland?

A. Yes, I do.

(Testimony of Helen Hansen.)

Q. And how long have you lived here, Mrs. Hansen? A. About thirty-two years.

Q. And are you acquainted with Mr. Matthew Deady, one of the defendants? A. Yes.

Q. And have you ever been married to him?

A. Yes, I was married to him at one time.

Q. And when was that? A. In 1917.

Q. And how long did that marriage continue?

A. Until July, 1919.

Q. Now, were you acquainted with his grandmother, Mrs. Lucy A. H. Deady? A. Yes. [281]

Q. And could you give us some idea as to how well you were acquainted with her, how often you saw her?

A. Well, I met Mrs. Deady before I was married to Matthew, and then I visited with her during the time I was—at different intervals during the time I was married to him.

Q. Now, during any of these times that you visited with her did she ever discuss with you or make any statement to you as to how she desired to have her property go?

Mr. Maguire: We object to that on the same ground and for the same reasons as the other witnesses.

The Court: Received in the record, under the same conditions; ruling reserved.

A. Well, Mrs. Deady talked to me, of course, about the property and told me—of course, I was very young then, and Matthew was, and he didn't

(Testimony of Helen Hansen.)

have very much, but she always told me that some day he and his brother would own that property at Broadway and Alder. And she has taken me—she used to take me downtown, and we would always go by there and she would always talk to me about it.

Mr. Jaureguy: What would be the particular occasions that would give rise to that type of conversation?

A. Well, when I would visit her she would show me pictures of the old home that stood on that corner, that was Judge Deady's home, and tell me of their earlier life, and that she always—she seemed to like to talk about it, and when we went downtown to- [282] gether she would generally take me to eat in The Cat'n' Fiddle, and we would go by the place and she would say that that was going to belong to Matthew and Hanover at some time after all the rest of them was gone.

Mr. Jaureguy: You may take the witness.

Mr. Maguire: No cross-examination.

Mr. Jaureguy: That is all, Mrs. Hansen; thank you.

(Witness excused.)

Mr. Jaureguy: We will call Mr. Matthew Deady.

[283]

MATTHEW E. DEADY,

one of the defendants herein, was thereupon produced as a witness and was examined and testified as follows:

The Clerk: State your name, please.

A. Matthew E. Deady.

(The witness was then duly sworn.)

Direct Examination

By Mr. Jaureguy:

Q. Now, you are Matthew Deady? A. Yes.

Q. One of the defendants in this case?

A. Yes.

Q. And could you tell us how old you are?

A. Fifty-one.

Q. And you live in Portland? A. I do.

Q. And what is your occupation?

A. I follow engineering, rodding and chaining.

Q. Rodding and chaining?

A. Engineering work.

Q. And have you lived in Portland all your life?

A. I have; born here.

Q. And what was the extent of your education?

A. Sir?

Q. How far did you go in school? [284]

A. Went through high school—or through grammar school.

Q. Did you go to high school?

A. No, sir; I was sick, I couldn't.

Q. Now, your grandmother, Lucy A. H. Deady, do you recall her? A. I do.

(Testimony of Matthew E. Deady.)

Q. And how far back does that recollection go in your childhood?

A. Oh, quite a ways back. I was quite small.

Q. And could you just relate to us how well you became acquainted with her and how often you visited her? Just give us a little statement along that line.

A. Well, we lived out on Curtis Avenue. My father used to take us over to what they called the Hill House that they were speaking about, the Hobart-Curtis, they called it, the two names, and have us visit Grandmother, practically every other Sunday. It seemed our great ambition for Sunday to come so Father could take us over to see Grandmother.

Mr. Maguire: May I have that answer again? I missed some of it.

(The last answer was then read.)

Mr. Jaureguy: Q. When was that that you say you lived out on Curtis Avenue, that your father took you over to see your Grandmother? How old were you then?

A. Oh, about twelve or thirteen; about there.

Q. And thereafter what happened? [285]

A. Well, we continued living out there on the same address, and she moved then from the Hobart-Curtis to the Alexandra Court, and we used to go over separately, sometime I would go over by myself, naturally knowing the way over there, and visit her all I could.

(Testimony of Matthew E. Deady.)

Q. Then when were you married?

A. In '17.

Q. 1917? A. Right.

Q. And where did you live then?

A. We lived on 19th and Lovejoy.

Q. And how far was that from the Alexandra Court, where she lived?

A. Well, it was about—not very many blocks. I would say eight or nine.

Q. During the time you were married how often did you see her, if at all?

A. I practically went up there every other night.

Q. And then how long did that continue?

A. Going to see her?

Q. Yes.

A. Just as often as I could see her.

Q. No, I mean how long? Did it continue up to the time of her death, or until some other time?

A. Oh, no; right along up to—I wouldn't say right up to her death, because I was out of town when she died, but previous to [286] the time I went out of town I went to see her, at any rate, every other night, sometimes three or four nights in a row. I was right near her. I would go up to see her. At the time Paul was alive he would be there, and we both would be there at the time.

Q. Who was that last person you said would be there?

A. Paul, my uncle.

(Testimony of Matthew E. Deady.)

Q. Now, during any of this time when you were visiting with your grandmother did your grandmother ever discuss with you or make any statements to you regarding what she intended to be the disposition of her property?

A. Yes, she did.

Mr. Maguire: Just a moment. May we have the same objection to this, this line of testimony, and any declarations or conversations of the decedent, Lucy A. H. Deady?

The Court: Received in the record, under the same conditions; ruling reserved.

Mr. Jaureguy: Q. Proceed.

A. Yes, she did.

Q. Can you give us an idea about when the first time was?

A. Well, at the time I was married, and she had talked to me with regards—not to worry about the way things were going with the wife and I at the time. She meant by that that she saw that I wasn't having things that she thought I ought to have, that as my age grew older, or we grew older, that we would have [287] things that we should have, because the property was going to come to Hanover and I and we should have things the way we would like to have them.

Q. You say that was when you were married?

A. Yes, sir.

Q. Well, did she ever discuss it prior to that time?

(Testimony of Matthew E. Deady.)

A. Not that I know of.

Q. Now, did your grandmother ever buy you any presents of any kind?

A. Yes, she did.

Mr. Maguire: We move to strike that, upon the ground that that is wholly irrelevant and immaterial.

The Court: The objection is sustained. Directed.

Mr. Jaureguy: Q. Did your grandmother ever have any conversation with you in which she discussed your Uncle Paul?

Mr. Maguire: Objected to as being wholly irrelevant and immaterial.

The Court: Except insofar as it relates to the matters particularly in interest, I would think that just general declarations regarding Paul wouldn't have any relevancy.

Mr. Jaureguy: That is right.

The Court: Just a preliminary question.

Mr. Jaureguy: It really should require a Yes or No answer, and then I should go on.

The Court: Yes. [288]

A. I would like to get the question again, please.

(The question referred to was thereupon read.)

A. Well, I don't know just what you mean by that, but she discussed my uncle with me in several ways, just talking about Uncle Paul.

Mr. Jaureguy: Q. Well, I think that answers the question.

(Testimony of Matthew E. Deady.)

A. Law work, and the like of that. I don't know just—

Q. (Interrupting) Did she ever discuss with you, or did she ever tell you that she had discussed with your Uncle Paul, how this property should go?

Mr. Maguire: Objected to as wholly irrelevant and incompetent. Objected to for the same reasons.

The Court: Leave it in the record, under the same conditions.

Mr. Jaureguy: Q. The answer is no?

A. No, she didn't discuss it.

Q. Did you ever visit this building with your grandmother? A. Yes, I have.

Q. And on those occasions would she discuss the building at all with you?

A. Yes, she did.

Q. And was that just once, or was that on several occasions?

A. Several times.

Q. Could you give us some idea as to about when that was?

A. Well, one time there when she took me down to 'The Cat 'n' Fiddle and we went in there to eat, after we got through and [289] came out we stopped alongside of the building and she said, "Matthew, when this building becomes—this property—"

Mr. Maguire: (Interrupting) Pardon me. I object to any testimony of declarations of the decedent to this witness in regard to the building's disposition, upon the same ground.

Mr. Jaureguy: You have it already.

(Testimony of Matthew E. Deady.)

Mr. Maguire: Well, I want to be sure I have got it in.

The Court: I think the record is perfectly clear.

Mr. Maguire: Very well. Go ahead.

A. "When this property becomes yours and Hanover's, I don't want you in any way to get it into debt or sell it. I want you to leave this corner as it is as a monument for your grandfather. This was our home, and I always want you two boys to look after it and keep it as such."

Mr. Jaureguy: Now, you gave one instance when you went down to The Cat 'n' Fiddle.

A. Yes.

Q. Well, could you give us some idea of when that was? A. What time?

Q. Not what time of day, but what year?

A. No, I couldn't.

Q. Would you say that was before or after you were married?

A. That was after I was married.

Q. Could you say how long after?

A. Well, I should say—Well, I would say a year. I was [290] only married two.

Q. That was during the time you were married?

A. Yes, sir.

Q. And was that only one occasion that she talked about the building?

A. Oh, she seemed to be very fond to bring up the family property to us. When we were up at the

(Testimony of Matthew E. Deady.)

house and would show me the pictures of the building, and that she seemed to be very proud to think that some day Hanover and I would become owners of the property.

Q. Now, you say that for some little time prior to your grandmother's death you were out of town?

A. Yes, sir.

Q. About how long was that, would you say, before her death?

A. Before her death? Well, about—about six or seven months.

Q. Now, after her death what was the situation with respect to your residence?

A. Well, I came back to the funeral, then I went back out of town again after the funeral. I was working with the Telephone Company at that time, in Eastern Oregon. I didn't know that she was sick until I read it in the paper.

Q. Now, did you sign some stipulations that I will show you here? First, handing you Exhibits I and J—where were you when you signed those, if you can recall?

A. One of them I was in Eastern Oregon, and the other I was [291] down at Seaside.

Q. Now, did you have any conversations with anybody before you signed them?

A. I just had a letter with each one of them from my brother saying it was all right to sign them, because I—

Mr. Maguire: (Interrupting) Just a moment.

(Testimony of Matthew E. Deady.)

Mr. Jaureguy: That part, yes.

Mr. Maguire: We have an objection to the communication in the letter from his brother as incompetent.

Mr. Jaureguy: Q. What I am getting at is this, in signing those did you form an independent judgment, or did you just rely on what Hanover told you?

A. I relied on what Hanover told me. His name was on them, and the executors' and other names, and I went ahead and signed them.

Q. Now, I wish you would tell us whether that was true with respect to other things in connection with this title?

A. Absolutely. I was out of town, and when I left I told Hanover when anything came up in connection with the property I would leave it up to him and whatever he said or did was all right with me and I would follow his instructions.

Q. Now, handing you two more, K and E.

A. I don't see my name on here, and name on these—pardon—

The Court: (Interrupting) The witness says he doesn't find his name on these. [292]

A. I did, sir.

The Court: Oh.

A. I was looking at the bottom one, and it was in the second one.

Mr. Jaureguy: Q. Can you tell us about signing those two?

(Testimony of Matthew E. Deady.)

A. I signed this one out of town, I don't know just where (indicating) and this one I signed in Mr. Simon's office (indicating).

Mr. Jaureguy: The first document that the witness referred to I think it is proper to state, if you have no objections, is E. The second one you refer to is K, I think.

Mr. Maguire: Now, E was signed out of town?

A. Sir?

Mr. Jaureguy: I am talking about the compromise—no, the other one.

A. This one I signed out of town (indicating).

Q. Well, you had better give them back to me and I will take them one at a time.

A. This one I signed also (indicating).

The Court: This is Exhibit K.

A. That is the one I signed in Mr. Dolph's—or Mr. Simon's office, and this one here I signed out of town (indicating).

The Court: And Exhibit E is the one that I am now handing you.

A. I signed this one out of town. [293]

Mr. Jaureguy: Q. What is the date of that document you have now in your hand, E?

A. Twenty-eighth day of October, 1925.

Q. Were you out of town at that time?

A. Yes, I was.

Q. Well, just to refresh your memory, didn't you acknowledge that before Lester Humphreys as Notary Public?

(Testimony of Matthew E. Deady.)

A. (The witness shook his head in a negative manner.)

Q. What is that? A. I don't remember.

Q. Now, were you ever in Joseph Simon's office with your brother Hanover where you had any conversation with Henderson Deady? I am referring to after you signed the Exhibit E in October, 1925.

A. Yes, I was up there with my brother. He had asked us to come up there to Simon's office.

Q. Were anybody else there with you at the time? A. Henderson was there.

Q. Yes. A. And—

Q. (Interrupting) Just you three?

A. Just us three.

Q. Just tell what took place.

A. Henderson wanted us to sign a stipulation to get money and we wouldn't do it, and he got very angry about it; in [294] fact, what you might say, he went right up in the air about it and made such a noise that the lawyer in the next office came out and tried to quiet him down and—

Q. (Interrupting) Who was that lawyer, do you know?

A. Mr. Humphreys.

Q. Well, did he give any reason why he wanted you to sign something to give him money?

A. Yes, he said he was going back to marry this woman, that he had been out here to establish a residence to get a divorce from the other party, and he wanted us to sign a stipulation to leave her

(Testimony of Matthew E. Deady.)

a certain sum of money in case he didn't get back there alive, that he was a sick man and he was kind of leary of himself about making it back there, and he wanted to see that she was taken care of if he should happen to die before he got there; but we refused it on the grounds that we didn't know her or didn't know who she was, and never seen her.

Mr. Jaureguy: You may take the witness.

Cross-Examination

By Mr. Maguire: Q. Now, as I understand it, Mr. Deady from the time you became a young man up until the time of your grandmother's death you used to go over to see her three or four—several times a week, sometimes three or four nights in a row?

A. When I was a young man—a little fellow, once a week, when Father took us over. As I got older and knew my way over town [295] I used to go over and see her quite often, but after I was married I used to go up and see her practically every other night, when I lived within eight or nine blocks to her home.

Q. Well, when was it, you say, after your father ceased taking you boys over there on Sundays, about what age was it when you started to go over there of your own volition?

A. I don't know, sir. I wouldn't know.

Q. Approximately?

A. Well, I wouldn't know. I couldn't say.

Q. Well, can you tell us about the time that

(Testimony of Matthew E. Deady.)

your father ceased taking you boys over there on Sundays?

A. No, I couldn't.

Q. About when was it that your father passed away? A. 1913, March.

Q. 1913; and you were then, of course, in manhood, were you not?

A. In the neighborhood of about twenty-seven, yes.

Q. About how many times a week would you say that you went over to see your grandmother from the time that you were, oh, fifteen, up to the time you were married?

A. Well, I don't think that we ever missed more than two Sundays in a month, and if we didn't go over there Grandmother used to come out and see us. Father would meet her at the train and we would be there with her, because we had a train running out there in those days. There were no street cars or anything. It was the St. Johns district. You all remember that district, [296] the train—and we used to go down and meet her, and if she didn't come out on Sunday Father always took us over there to see her.

Q. Well, were there any trains running out to St. Johns as late as 1913?

A. In '13? No, not then. I am talking about before Father died, that she used to go out—

Q. (Interrupting) Was there any train running out there as late as 1905?

(Testimony of Matthew E. Deady.)

A. Yes, there was.

Q. Steam train, or what kind of train was it?

A. Steam train. I think that was the time the steam train was running, in 1905. Quite sure. It changed to the electric at one time, but I can't remember the date, just when that was changed to electric, but I think it was 1905 that the train was still running.

Q. Well, when was it that you first commenced to go over alone to see your grandmother?

A. I don't remember.

Q. Was it as young as when you were fifteen years of age? A. Fifteen?

Q. Fifteen. A. Yes. Yes, sir.

Q. Well, would it be safe to say from the time you were fifteen years of age on that you went over to see your grandmother several [297] times a week?

A. Oh, yes, sir.

Q. She was then living in an apartment hotel, was she not?

A. I can't remember whether she was living at the Hill or not.

Q. Well, she was living in an apartment hotel?

A. Yes, sir.

Q. Whether it was the Hill, the Virginia-Hill or whether it was the Hobart-Curtis, or which one it was? A. Yes.

Q. And, as I understand it, it used to be the ambition of you boys when your father was taking

(Testimony of Matthew E. Deady.)

you over there, was the Sunday visit; that was your great ambition?

A. Yes, sir.

Q. That started from the time you were about how old?

A. Well, I don't know.

Q. Haven't you any idea at all?

A. No, sir.

Q. Your memory isn't very good about that?

A. No, sir. I was too small. I remember going to see Grandmother, but how old I was I don't know. I remember Father taking us over there.

Q. Well, if you were old enough to remember that these weekly visits were your childhood ambition, couldn't you give us some idea how old you were at that time when you formed that ambition?

A. Oh—no, I couldn't. [298]

Q. You remember the ambition, but not your age?

A. Yes, sir.

Q. Now, when was it that your grandmother first commenced to state to you about her hopes that some day you and Hanover would be the owners of the property at First and Alder—I mean Broadway and Alder, not First and Alder; Broadway and Alder?

A. How old was I?

Q. Yes. A. I don't remember.

Q. Well, had you been married at that time?

A. The first time she spoke to me, I wasn't married.

(Testimony of Matthew E. Deady.)

Q. How many years before you were married?

A. Oh, I should say several years before.

Q. About what do you mean by "several"?

A. Well, I would put it five or six years before.

Q. Five or six years? A. Yes, sir.

Q. When were you married? A. In 1917.

Q. When did your Uncle Paul die?

A. In 1923.

Q. I beg your pardon?

A. 1923, Paul died, March of 1923.

Q. Did he die prior to the time you and your first wife were divorced, or after? [299]

A. He died—let me see—I was divorced when he died?

Q. When were you divorced? A. 1919.

Q. In 1919? A. Right.

Q. So then he didn't live until 1923, did he?

A. He did. He died in 1923—I don't remember now. 1923 was when he died.

Q. Well, while your Uncle Paul was alive did your grandmother ever make any statement that she wanted you and Hanover to have the property?

A. Yes, she made the statement, one time when I was up there, that the property was—would be ours, that is, Hanover and I, when we were older and when the others had passed away, that she wanted us to be sure and look after it and take care of it.

Mr. Maguire: That is all, thank you.

Mr. Jaureguy: That is all.

(Witness excused.)

The Court: Take a recess, gentlemen.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

Mr. Jaureguy: The defendants now offer in evidence Defendants' Pre-Trial Exhibit F, which is the order of the Circuit Court of Multnomah County, Probate Department, fixing the inheritance taxes in the Estate of Lucy A. H. Deady, deceased.

[300]

Mr. Maguire: May I inquire of counsel what it is claimed the relevancy of this is?

Mr. Jaureguy: Yes, surely. The will of Mrs. Deady provided that the inheritance taxes would be paid out of income from the estate, that is, were not to be paid by the beneficiaries, but by the estate and out of the income, and would be paid prior to the division of income among her beneficiaries. Then that connects up with the arguments and the evidence and the statements and the exhortations of Henderson Deady that he wanted to get an advance and he wanted to get his income right away rather than wait; that, together with the sinking fund—the sinking fund was taken care of in the pre-trial order. There is something in the pre-trial order giving the amount of inheritance tax, accepting the amount as fixed in the order.

Mr. Maguire: Well, what the inheritance tax was and when it was ordered paid, it seems to me that would be wholly irrelevant and immaterial and neither adds nothing nor takes nothing away from the rights of Henderson Brooke Deady nor

takes nothing away from the plaintiff, and we object to it on those grounds.

The Court: Received subject to the objection and subject to the former ruling.

(Certified photostatic copy of Order of Multnomah County Probate Court of April 21, 1924, determining state inheritance tax in Lucy A. H. [301] Deady Estate, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit F, was thereupon marked received subject to the objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT F

In the Circuit Court of the State of Oregon
For the County of Multnomah
Probate Department.

No. 22735.

In the Matter of the Estate of
LUCY A. H. DEADY,
Deceased.

Now on this day come Henderson Brooke Deady and Joseph Simon, Executors of the Last Will and Testament of Lucy A. H. Deady, deceased, and present their petition duly verified and filed herein, praying for an order fixing and determining the amount of inheritance tax upon the property passing by the death of the deceased, due the State of Oregon, and directing payment therefor.

And it further appearing to the Court from the inventory and appraisal filed herein, that the gross value of said estate is the sum of.....\$276,347.02

That the claims against said estate presented and allowed amount to..... 42,623.55
and the costs and expenses of administration and of executing the will of deceased, amount to..... 9,271.22
leaving a net estate upon which said inheritance is to be calculated, amounting to.....\$224,452.25

\$10,000 Exempt
15,000 at 1%.....\$ 150.00
25,000 at 1½%..... 375.00
50,000 at 2%..... 1,000.00
\$124,452.25 at 3%..... 3,733.57
Collateral Tax 2,247.92

Total Tax\$7,506.49

Marye Thompson Deady, no relation,
57 years, Portland, Oregon,
Bequest of \$75.00 per month for
life or until beneficiary marries, Value of Bequest, \$9,323.38

Tax \$500.00 at 2%..... \$10.00
500.00 at 4%..... 20.00
1,000.00 at 6%..... 60.00
2,000.00 at 8%..... 160.00
5,323.28 at 10%..... 532.33

\$782.33

Mary E. Deady, no relation,
65 years, Portland, Oregon,
Bequest of \$150.00 per month
for life, Value of Bequest, \$14,103.94

Tax \$ 500.00 at 2%..... \$10.00
500.00 at 4%..... 20.00
1,000.00 at 6%..... 60.00
2,000.00 at 8%..... 160.00
6,000.00 at 10%..... 600.00
4,103.94 at 15%..... 615.59

\$1,465.59

Total Inheritance Tax due the State of Oregon.....\$7,506.49

It is Therefore Ordered and Adjudged that the amount of such inheritance tax be and the same hereby is fixed at the sum of \$7506.49; that said sum, less the amount of rebate which may be allowed for prompt payment be forthwith paid by said Executor to the Treasurer of the State of Oregon, and be charged to the beneficiaries under the Will of Deceased, as herein estimated.

Dated April 21, 1924.

[Illegible]

Judge.

127/67

No. 87012

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Order in the Matter of the Estate of Lucy A. H. Deady, Deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Order as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my

hand and affixed the seal of said Court, this 13th day of July, A. D. 1940.

(Seal)

A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Defendants now offer in evidence Defendants' Pre-Trial Exhibit L, which is a stipulation between the Executor and Trustee of the Estate of Lucy A. H. Deady and the State Treasurer for the settlement of the inheritance tax which became due after the death of Henderson Brooke Deady by reason of the exercise of appointment given in the will of Lucy A. H. Deady. I will say that that will be followed up by the petition, the order, and some correspondence from The First National Bank and from Robert F. Maguire.

Mr. Maguire: Well, with regard to this particular exhibit, inasmuch as it purports to be a stipulation entered into in September, 1935, after the death of Charlotte Howell Deady, we object to this stipulation or any of the recitals therein or the facts as contained, that it could bind neither Charlotte Howell Deady nor Richard Howell, the plaintiff, as wholly irrelevant and immaterial.

The Court: Let me see it.

Mr. Jaureguy: I might add that it can properly be considered, I think, only in connection with the further exhibits that I have referred to and which will presently be offered. [302]

The Court: I don't see the relevancy of this, offhand.

Mr. Jaureguy: I would like to suggest, if your Honor please, if your Honor has no objection, that you wait and reserve ruling at least until I offer these others, and then I think it will connect it up.

The Court: Put it in the record, and ruling reserved.

(Photostatic copy of Stipulation for Settlement of Inheritance Tax in Lucy A. H. Deady Estate, dated September — 1935, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit L, was there-upon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT L

In the Circuit Court of the State of Oregon
For the County of Multnomah
Department of Probate

No. 22735

In the Matter of the Estate of

LUCY A. H. DEADY,

Deceased.

STIPULATION FOR SETTLEMENT OF INHERITANCE TAX

Comes now Rufus C. Holman, State Treasurer of the State of Oregon, and The First National Bank of Portland, Oregon, executor of the estate of Lucy A. H. Deady, and trustee under said decedent's will, and stipulate as follows for the settlement of

additional inheritance tax to the State of Oregon therein, that

Whereas, under the eighth clause of the will of said decedent, Henderson Brooke Deady is given the power to appoint by his last will and testament, to his wife, if he had a wife living at the time of his death, two-thirds of the net income of lot one block 212, City of Portland, to be held and enjoyed by his wife for the term of her natural life, and

Whereas, the said Henderson Brooke Deady, died on or about the 28th day of May, 1933, leaving a last will and testament duly executed wherein and whereby he exercised said power of appointment by appointing the said two-thirds income from said real property to his wife, Charlotte Deady, for the period of her natural life, and

Whereas, at the death of Henderson Brooke Deady, additional inheritance tax accrued to the State of Oregon in the estate of Lucy A. H. Deady, by reason of the exercise of said power of appointment, and

Whereas, said Charlotte Deady died on the eighth day of August having enjoyed the said income for a period of approximately two years and three months, and

Whereas, a controversy exists between the said executor and State Treasurer as to the proper method of arriving at the value of the bequest of said income to said Charlotte Deady and as to the valuation which should be placed upon such legacy for the purposes of inheritance tax of the State of Oregon, and

Whereas, said legacy is of such a nature that the liability for inheritance tax and the valuation thereof is doubtful and cannot with reasonable certainty be ascertained under the provisions of law and the parties hereto have agreed to a final compromise and settlement of all liability of said estate for inheritance tax upon said legacy in consideration of payment to the State of Oregon of twenty-five hundred dollars (\$2500.00).

Now Therefore, for the best interest of said estate and the state of Oregon, the parties hereto agree:

(1) That the said executor shall forthwith pay to the State Treasurer the sum of twenty-five hundred dollars (2500.00) which sum shall be received by the State Treasurer in full and final settlement of all liability of said estate upon inheritance tax of Charlotte Deady and official receipt of the State Treasurer issued therefor;

(2) that the court may make an order fixing and determining inheritance on said legacy in accordance herewith.

In Witness Whereof, the parties hereto have set their hands this day of September, 1935.

RUFUS C. HOLMAN

State Treasurer

THE FIRST NATIONAL BANK
OF PORTLAND

By M. A. TAYLOR

Executor and Trustee of the
estate of Lucy A. H. Deady,
deceased

The foregoing stipulation is hereby approved for the reasons therein set forth.

W. VAN WINKLE

Attorney General of Oregon

Approved: [Illegible]

Circuit Judge

[Endorsed]: Filed Oct 1 1935 A. A. Bailey, Clerk
L. H. Emerson, Deputy

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: I am offering these in the order in which they were marked at pre-trial, which is not in chronological order. Defendants' Pre-Trial Exhibit M, which is Petition For Determining Contingent Inheritance Tax, being a document for a similar purpose as that of the last exhibit.

Mr. Maguire: We object to this upon the same grounds and for the same reasons.

The Court: Received in the record under the same conditions.

(Photostatic copy of Petition For Determining Contingent Inheritance Tax, In the Matter of the Estate of Lucy A. H. Deady, Deceased, so offered and received, having previously been [303] marked as Defendants' Pre-Trial Exhibit M, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT M

In the Circuit Court of the State of Oregon
for the County of Multnomah
Department of Probate.

No. 22735

In the Matter of the Estate of LUCY A. H.
DEADY, Deceased.

PETITION

For Determining Contingent Inheritance Tax.

Comes now The First National Bank of Portland (Oregon), Executor of the Estate of Lucy A. H. Deady, deceased, and respectfully shows to the Court:

That on or about the 25th day of November, 1924, this Court made and entered an order in the matter of the Estate of Lucy A. H. Deady, deceased, wherein the Court found and determined as far as was then ascertainable the value of the respective distributive shares of said estate under the Will of said decedent, together with the amount of inheritance tax then due to the State of Oregon upon said legacies, which tax was thereafter duly paid to the State of Oregon and receipt issued therefor. At the time said Order of Tax Determination was made there existed a possibility of additional inheritance tax accruing to the State of Oregon by reason of the provisions of decedent's Will hereinafter mentioned, which contingent tax has never been determined heretofore.

By Virtue of Paragraph Eighth of the Will of

said decedent a power was vested in Henderson Brooke Deady to appoint by Will two-thirds of the net income of Lot 1 Block 212, City of Portland, unto his wife for her life, if he should have a wife living at the time of his death.

Said Henderson Brooke Deady died on the 28th day of May, 1933, leaving a Last Will and Testament duly executed, wherein he exercised said power of appointment by bequeathing the said two-thirds income from said real property to his wife, Charlotte Deady, for the period of her natural life. By reason of the exercise of said power additional inheritance tax accrued to the State of Oregon upon the life estate thus passing to Charlotte Deady.

That pending the adjustment of said inheritance tax said Charlotte Deady died in August, 1935, having enjoyed the income from said property for a period of only two years and three months. The death of Charlotte Deady has rendered it uncertain what basis should be adopted for valuation of the interest which she received in the income of said property, and consequently, the amount of inheritance tax which should be assessed thereon. A controversy having arisen between the State Treasurer and the First National Bank, as Executor of said Estate, as to the valuation of said inheritance and the amount of tax, said Executor and the State Treasurer have, with the approval of the Attorney General and this Court, entered into a Stipulation for the compromise and final settlement of the said tax upon the payment to the State of Oregon of the sum of \$2500.00, which Stipulation is on file herein.

Wherefore, Petitioner prays that an Order of this Court be made based upon said Stipulation, fixing and determining the amount of inheritance tax to be paid, the State of Oregon upon the distributive share of Charlotte Deady in the sum agreed upon, to-wit: \$2500.00.

THE FIRST NATIONAL BANK OF
PORTLAND (Oregon),
Executor,

By M. A. TAYLOR,
Assistant Trust Officer.

SIMON, GEARIN, HUMPH-
REYS & FREED,
Attorneys for Petitioner.

State of Oregon,
County of Multnomah—ss.

I, M. A. Taylor, being first duly sworn, say that I am Assistant Trust Officer of The First National Bank of Portland (Oregon), Petitioner above named, and that the statements contained in the foregoing Petition are true, as I verily believe.

M. A. TAYLOR.

Subscribed and sworn to before me this 1st day of October, 1935.

(Seal)

R. A. WELCH,

Notary Public for Oregon.

My commission expires Sept. 5, 1936.

[Endorsed]: Filed Oct. 1, 1935. A. A. Bailey,
Clerk; L. H. Emerson, Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: And Defendants' Pre-Trial Exhibit N, which is the order fixing inheritance tax, dated October 1st, 1935.

Mr. Maguire: Object to that on the same grounds and for the same reasons.

The Court: Same ruling.

(Photostatic copy of Order Fixing Inheritance Tax, In the Matter of the Estate of Lucy A. H. Deady, Deceased, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit N, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT N

In the Circuit Court of the State of Oregon for the
County of Multnomah, Probate Department.

No. 22735

In the Matter of the Estate of
LUCY A. H. DEADY, Deceased.

ORDER

Fixing Inheritance Tax

This day came The First National Bank of Portland (Oregon), Executor of the Estate of Lucy A. H. Deady, deceased, and petitioned the Court for an Order determining the amount of inheritance tax to be paid the State of Oregon on the distributive share of Charlotte Deady under the Will of Lucy A. H. Deady, deceased;

And it appearing to the Court that The First National Bank of Portland, (Oregon), as Executor and Trustee of said Estate, and Rufus C. Holman, State Treasurer of the State of Oregon, have with the approval of this Court and the Attorney General duly made and filed their written Stipulation for compromise and settlement of said inheritance tax, and that an Order determining said tax should be entered in accordance with said Stipulation;

Now, Therefore, It Is Hereby Ordered and Decreed that said Stipulation for compromise of said tax be and the same hereby is approved; that inheritance tax due to the State of Oregon in the Estate of Lucy A. H. Deady, deceased, upon the distributive share received by Charlotte Deady from said estate be and the same hereby is fixed and determined in the sum of \$2500.00. That said Executor forthwith pay said tax to the State of Oregon, which payment shall be in full and final settlement of any and all inheritance taxes due to the State of Oregon in the matter of said Estate.

Dated this 1st day of October, 1935.

[Illegible]

Circuit Judge.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: And letter from Rufus C. Holman, State Treasurer, to the First National Bank of Portland, dated May 16, 1935, with reference to tax which became payable from the Lucy A. H. Deady Estate after the death of Henderson Deady.

Mr. Maguire: We object to this upon the same grounds and for the same reasons.

The Court: Received in the record under the same conditions.

(Typewritten copy of letter, bearing date May 16, 1935, Rufus C. Holman, State Treasurer, by E. G. Sanders, Inheritance Tax Auditor, to First National Bank of Portland, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit O, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT O

State of Oregon
Treasury Department
Salem

Portland, Oregon
May 16, 1935

First National Bank of Portland
Sixth & Stark Streets
Portland, Oregon

Gentlemen:

We have recently examined the probate record in the estate of Lucy A. H. Deady, decease, who died

August 29, 1923, and observe that you have qualified as executor and trustee of her estate as successor to Joseph Simon, now deceased.

We further observe that Henderson Deady, a son of Lucy A. H. Deady and a legatee under her will, died May 28, 1933, and by his last will and testament exercised a power conferred by the will of Lucy A. H. Deady whereby his widow, Charlotte Deady, became entitled for her life to two-thirds of the income from the mother's estate. Two-thirds of the income appears to be at least \$600 per month, with some prospect of her receiving any excess income over and above mortgage retirement requirements.

By virtue of Henderson Deady's election for the benefit of his widow a substantial additional inheritance tax accrued to the State of Oregon at his death upon the present worth of the life estate of Charlotte Deady thus created. This tax accrued from the estate of Lucy A. H. Deady as donor of the power.

We understand that Charlotte Deady was sixty years of age at the time of her husband's death. Assuming \$600 per month, or \$7,200 per year, as her income, the present value thereof for her life, as found by the statutory of mortality tables, is \$67,786.00, with a resulting inheritance tax thereon at the rates prescribed in the third classification of Section 10-603, Oregon Code 1930, of \$12,546.50. Interest is accruing on the tax at the rate of eight

per cent from eight months after the death of Henderson Deady, or January 28, 1934.

The record also indicates that Carlotte Deady's share of the income has been paid to her by your predecessor without any retention therefrom to provide for her inheritance tax. Consequently if some definite arrangement is not made by you within one week from date of this letter to protect the state's interests, we shall be compelled to take action ourselves on behalf of the State.

Very truly yours,

RUFUS C. HOLMAN,

State Treasurer

By E. G. SANDERS,

Inheritance Tax Auditor

EGS:HR

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: And we offer now Pre-Trial Exhibit P, which is a letter from Maguire, Shields & Morrison, by Robert F. Maguire, to the First National Bank, discussing the letter from the State Treasurer to the First National Bank and giving his opinion on the matter of the inheritance taxes.

Mr. Maguire: Objected to upon the same grounds and for the same reasons.

The Court: Received in the record under the same conditions

(Typewritten copy of letter, bearing date May 23, 1935, Maguire, Shields & Morrison, by Robert F. Maguire, to First National Bank, Portland, Oregon, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit P, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT P

Frederick Steiwer
Counsel

Law Offices of
Maguire, Shields & Morrison
Attorneys at Law
1113 Public Service Building
Portland, Oregon

Robert F. Maguire
Roy F. Shields
William H. Morrison

Leland B. Shaw
Delmas R. Richmond

May 23rd, 1935

First National Bank,
Portland, Oregon.

Gentlemen:

Mr. Robert Strong, executor of the estate of Henderson Brooke Deady, has referred to us a copy of the letter of the State Treasurer dated May 16, 1935, relative to the inheritance tax alleged due the

State of Oregon by reason of the exercise of the power of appointment given him under the will of Lucy A. H. Deady, deceased, to will a portion of the income and real property in favor of his surviving widow.

We are of the opinion that the tax in question is not properly assessed and would be glad to discuss the matter with you.

In our judgment the utmost that the state can claim would be the inheritance from the wife to her husband, which would be less than one-twelfth of the amount of the claim.

Yours very truly,

MAGUIRE, SHIELDS &
MORRISON

By /s/ ROBERT F. MAGUIRE.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Those are the letters which I stated would connect up with Exhibit L and which should be considered together, some of them after the death of Charlotte Deady and some prior to the death of Charlotte Deady. [305]

Then we offer in evidence Pre-Trial Exhibit Q, Defendants' Pre-Trial Exhibit Q, which is a letter, dated October 25, 1923, from Wilbur, Beckett & Howell, by R. W. Wilbur, addressed to Mr. Joseph Simon, regarding the contentions—or the position, rather, of Mr. Wilbur as attorney for the two individual defendants in this case.

Mr. Maguire: We object to this on the ground that it is wholly irrelevant and immaterial, it is incompetent to prove any fact in issue, is not binding upon Henderson Brooke Deady, Charlotte Howell Deady, or the plaintiff.

Mr. Jaureguy: Your Honor will recall the conversations between Henderson Brooke Deady and Hanover Deady in which Henderson Brooke Deady was urging that he be given an immediate income as large as possible and that the sinking fund be deferred, and also that he stated to them that Mr. Simon had said to him that if he could get their consent it was all right with him. Now, this is the letter that was sent prior to those conversations, or at least prior to most of them, in which the position was taken and the estate was advised through one of its executors what their position at that time was, so as to show the position that had been taken on their behalf, which Henderson was attempting to overcome. That is the purpose of this letter.

Mr. Maguire: There being no showing that that letter was ever shown to, or read to, or the contents communicated to, [306] Henderson Brooke Deady, it being merely addressed to a stranger, it has no relevancy or competency whatsoever in this case.

Mr. Jaureguy: This was addressed to an executor of the estate, the very man, along with Henderson Deady, who was required to make the decision as to whether Henderson was going to get any money at all or not for a certain time, and, if so,

how much, and the man, I can say, that has probably more than fifty per cent of the right to say, because he was the one standing in a neutral position, whereas Henderson was in the position of the person to be benefited, whereas Simon was the last one to be convinced; this was given to him as executor. Now, in addition to all that, the statement that Henderson said that Simon had told him that if he could get the consent of the boys it was all right with him.

Mr. Maguire: It indicates, your Honor, the extreme danger of listening to any hearsay testimony. If a witness is to be permitted to state that someone not a party to the litigation told him something, and then we attempt to prove that that person told him something by proving a communication from another person to the first person, neither of whom are litigants, and with no foundation laid to show that either the plaintiff or any of the plaintiff's predecessors in interest had the slightest knowledge of the communication, why, we just simply throw proof at large and we are deciding cases entirely [307] upon hearsay ex-parte statements.

The Court: Well, I will receive it under the same conditions.

(Letter, bearing date October 25, 1923, Wilbur, Beckett & Howell, by R. W. Wilbur, to Mr. Joseph Simon, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit Q, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT Q

R. W. Wilbur

H. B. Beckett

F. C. Howell

E. K. Oppenheimer

Wilbur, Beckett & Howell
Attorneys at Law
Board of Trade Building
Portland, Oregon

Mr. Joseph Simon,
Attorney at Law,
Mohawk Building,
Portland, Oregon.

My Dear Mr. Simon:

In re Deady Estate.

We represent the interests of Mary E. Deady, Matthew Edward Deady and Hanover Deady and I am addressing you in the interests of my clients.

A few days ago rumor came to me that Mr. Henderson Deady was going to endeavor to borrow or get an advance of some kind from the estate and my clients desire to protest against such a procedure and I do not believe that he is entitled to such an advance either under the will or legally and from my conversation with you over the phone a few days ago, I understand that you concur in this opinion.

Rumor has also come to me that Mr. Henderson Deady wants to break the Ungar lease on the property at Broadway and Alder Streets on the theory that Ungar has no right to sublet the property. In my opinion, it would be inadvisable to precipitate any litigation of this kind unless there was a positive provision in the lease to Mr. Ungar that he should not sublet. It is possible that there is a provision in the lease that Ungar was not to sublet without the consent of Mrs. Deady but it is quite possible that Mrs. Deady's consent may have been obtained to the subleasing.

I have further been informed that Mr. Henderson Deady would like to get hold of some money from the estate, probably to pay his regular living expenses and if money can be paid consistent with the provisions of the will and preserving enough of the assets to take care of all of the obligations, I am inclined to think that my clients would be in favor of this purely as a matter of family good feeling.

Under Section 5 of the will, there was left \$150.00 per month to Mary E. Deady and \$75.00 per month to the widow of Paul Deady and these appear to be specific bequests.

In Paragraph "a", being the next paragraph of the will, there is given to Matthew Deady and Hanover Deady \$100.00 per month each, and the remainder of the income shall be paid to Henderson Brooke Deady. I take it that the \$100.00 to be paid to the two grandchildren is also a specific bequest

and that the bequest to them and the bequest to Mary E. Deady and the widow of Paul Deady, are cumulative and really begin to run from the time of the death of Lucy Deady.

There is a provision that the remainder of the income shall be paid to Henderson Deady but that there shall be no such distribution until the inheritance taxes and legacies have been paid and the sinking fund provided for for the purpose of paying off the mortgage upon the property.

Roughly figuring the income of this estate, it is possible that Henderson Deady might get an income of approximately \$600.00 a month but I assume that no such sum could be paid to him in view of the fact that the amount of the inheritance taxes and the amount required to provide for the sinking fund cannot be ascertained accurately and in talking over this matter with my clients, believe that it would be satisfactory to them, if it is consistent with your views and with the law, to have paid from the income each month as follows:

Mary E. Deady	\$150.00 per month
Marye Thompson Deady	\$ 75.00 per month
Matthew Edward Deady	\$100.00 per month
Hanover Deady	\$100.00 per month

That there be paid to Henderson Brooke Deady perhaps \$150.00 or \$200.00 per month, the same to apply on any sums that might be due to him out of the remainder of the income after the payment of the inheritance taxes and providing for the sink-

ing fund, as it would apparently be absolutely safe for Henderson Deady to get \$150.00 or \$200.00 a month.

It is naturally for the interests of my clients and particularly the two grandsons to have as large a sinking fund created as possible so as to pay off the mortgage, as under present family conditions, as I understand them, under Paragraph 7, the two grandsons will probably eventually own this whole property.

Relative to the payments that I have spoken of above, it seems to me that the executors would be fully protected if all of the interested parties should enter into a stipulation for a payment of these bequests or monthly allowances at the present time on the basis above mentioned and that the court would probably order payments in view of the fact that all parties would agree to these payments, but, of course, the payments to Henderson Deady will have to be small enough so as to allow an ample amount to pay the expenses of administration, income taxes and provide for the sinking fund.

Therefore, I desire to say that in my opinion, all of the bequests herein spoken of are specific bequests and should be paid as soon as the executors can determine that they can safely be paid with the exception that Henderson Deady is to get nothing until all of these bequests have been paid and also money provided for the purposes herein above mentioned, and in my opinion, the estate can probably

allow Henderson Deady on account the matter of \$200.00, or something of that kind, per month.

I will be glad to hear from you about these matters to know if some plan outlined as above meets with your approval and it seems to me that it is the only plan that can possibly be devised for Henderson Deady to get any money out of the property until the estate is settled.

Yours very truly,

WILBUR, BECKETT &
HOWELL

By R. W. WILBUR.

RWW/P

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Then we offer in evidence Defendants' Pre-trial Exhibit R, which is a carbon copy of a letter, dated October 26, 1923, addressed to Messrs. Wilbur, Beckett & Howell, and, while it does not have any signature, I think that it is probably admitted in the pre-trial order that it was written by Joseph Simon.

Mr. Grant: We admit the authenticity.

Mr. Jaureguy: In answer to the letter which is Defendants' Pre-Trial Exhibit Q, and stating Mr. Simon's position on the matter.

Mr. Maguire: We make the same objection, on the same grounds and for the same reasons.

Mr. Jaureguy: This, I may say, perhaps has an additional ground of admissibility, and that is a

subject matter thereof with Dr. Deady and Chester V. Dolph.

Enclosure.

Very truly yours

JS/K.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Then there has been received, subject to objection, Defendants' Pre-Trial Exhibit G, which is a copy of an unexecuted agreement, and after that was received subject to the objection there was some discussion about it and we stated that we would obtain the original. We do not have it here now, but we think we can have it the first thing in the morning.

The Court: I think that will be perfectly all right, to bring it in the morning.

Mr. Jaureguy: And, as presently advised, why, that is all the evidence we have to introduce. If we could rest with that reservation, why,—

The Court: (Interrupting) Yes. [310]

Mr. Maguire: May it please your Honor, so that we may come to as intelligent a conclusion upon this matter that has now arisen as possible, we now request the Court to rule on our objection and our motion to strike the testimony of Hanover Deady with regard to the Exhibit G and with regard to the position which he had taken to the right of Charlotte Howell Deady to receive the income during her life and the testimony that he had not heard

that she had made no claim of a fee simple estate prior to the time that he declined to execute Exhibit G, and that if he had known of it he would have executed Exhibit G. We appreciate the difficulty that the Court may be in, in view of the way that by common consent we have proceeded in the taking of testimony, and were this the matter of any other witness I would not suggest to the Court the necessity or even advisability of making a ruling at this time, but since the Court is aware of the situation I don't see that in justice [366] to the interests of our client we can do other at this time than make this motion.

The Court: Court will be at recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

The Court: I am sorry that the question has arisen in just the way that it has, but I am forced to the conclusion that I must announce to you what my determination of the facts of this case is. On the plaintiff's case as it now stands there are questions, it is true, of the admissibility or inadmissibility of evidence in this case, technical questions, on which I will give you a ruling so that you can make up your record. A great many of the matters are, in my opinion, inadmissible, but taking the case as a whole I see nothing in the testimony which tends to make me vary the conclusion that I arrived at in reading the will itself. I have given a very careful study of the will, extending over months,

and I have arrived at the conclusion that the main point in Mrs. Deady's consideration at the time that she drew the will was that she desired to keep this property intact for an indefinite period of time, and that conclusion is borne out by the testimony in this case. That alone would not necessarily invalidate the executory devise, except for the fact that in her own thinking and in the terms of the will, which I believe reflected her thinking, she made the executory devise depend upon the period of [367] distribution. Now, one cannot tell from the terms of the will when the period of distribution was to be. I have taken meticulous care to try to discover when this so-called trust would end. I have been unable to discover from the terms of the will, I think no one else has been able to discover, when it would end. The estate in this case has been held open, the trusteeship has been continued as an operation, even today. Now, as the Court formerly determined, making the executory devise depend upon that indefinite period of distribution rendered it invalid, and, incidentally, followed the rule against perpetuity. The result of that was, viewing the whole situation, the only way that the Court could uphold the will at all, under the decisions of the Supreme Court of Oregon, was to treat the gift to Henderson Brooke Deady as a fee upon the death of the testator. She was at that time living. It is unfortunate, even in my own thinking, the main desire of the testatrix to hold this property, to give the benefit to her family in perpetuity, can-

not be carried out, but I think it was a natural desire, which was frustrated by the rules of law, and I see nothing in this record, whether the evidence be admissible or inadmissible, which tends to make me believe that the testatrix did not intend, under the circumstances, to give the fee to Henderson Brooke Deady. I think her intention was a little vague on that point, and I think it has been reflected in the testimony here as to [368] just how that worked out, but I find nothing in the testimony any place which indicates that she thought the executory devise would take effect at any time except at the point of distribution, wherever that may be.

The dealings between Hanover Deady and Charlotte Howell Deady indicate, in my mind, that they were looking at the matter from two different points of view. In the offered document there it seems that Charlotte Howell Deady was asking for a life estate in two-thirds of the property. Unless she was claiming more interest than simply the distribution of the income from two-thirds, I do not think that the document would have been written in that way.

There is another point that I will take into consideration for a moment, and that is the promise upon the part of Henderson Brooke Deady that he would have no children in the future. If that promise was made to anybody I do not think anyone could have relied upon it. A man could not say that he could not have children in the future.

I do not think that he could guarantee that. I do not think that anyone would have a right to believe that he could guarantee it, either his mother or other heirs of the estate. It is perfectly certain that if he had heirs they took the fee, if he had issue they took the fee. And so that is going to be the outline of my decision, gentlemen, and you can make up this record any way that you wish and I will rule upon the technical questions [369] and give you a memorandum upon it, and I think perhaps I should embody these conclusions in a definitive memorandum before I discuss the testimony.

Mr. Grant: In view of that, your Honor—in the first place we consent to the substitution of the original, reserving the same objections to the original that we made to the originally offered copy, Exhibit G.

(The original unexecuted agreement between Charlotte Howell Deady, Hanover Deady, et al, dated October 22, 1934, so produced, offered and received, was thereupon substituted for typewritten copy previously marked as Defendants' Pre-Trial Exhibit G, similarly marked, and was received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT G

This Indenture made this 11th day of October, 1934, between Charlotte Howell Deady, widow of Henderson Brooke Deady, deceased, of New Milford, County of Litchfield, State of Connecticut,

party of the first part, and Hanover Deady and Ariel Deady, his wife, and Matthew Edward Deady and Margaret Deady, his wife, all of the City of Portland, Multnomah County, State of Oregon, parties of the second part.

Witnesseth:

That Whereas Lucy A. H. Deady of Portland, Oregon, now deceased, in her lifetime was the owner in fee simple of that certain parcel of real property described as Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon, and its appurtenances and

Whereas, Lucy A. H. Deady died on or about August 29, 1923, leaving a last will and testament made, executed and declared as such and dated July 29, 1920, which said last will and testament has been duly admitted to probate in the Probate Department of the Circuit Court of the State of Oregon for Multnomah County and

Whereas, in and by said last will and testament an undivided two-thirds of said real property was devised to the said Henderson Brooke Deady and an undivided one-third of said real property was devised to Hanover Deady and Matthew Edward Deady, of the parties of the second part, said devises being subject to certain conditions, provisions and charges in said will contained and

Whereas, Henderson Brooke Deady died testate on or about May 26, 1933, and his last will and testament has been duly admitted to probate in the

sold, assigned, transferred or conveyed the estate and interest hereby conveyed to them in any respect or to any person whomsoever, and that she will warrant and defend the same against the lawful claims of all persons whomsoever claiming under or through her.

The said Hanover Deady and Ariel Deady, his wife, and the said Matthew Edward Deady and Margaret Deady, his wife, do hereby give, grant, bargain, sell, convey and confirm unto Charlotte Howell Deady a life estate in an undivided two-thirds interest in said real property and its appurtenances, and in and to the rent, income and profits therefrom, subject only to the charges made upon said income, rents and profits in favor of Mary E. Deady (widow of Edward Nesbith Deady), and Marye Thompson Deady (widow of Paul R. Deady, deceased). And the said Hanover Deady and Ariel Deady, his wife, and the said Matthew Edward Deady and Margaret Deady, his wife, each for himself or herself does hereby covenant to and with the said Charlotte Howell Deady that he or she has not heretofore mortgaged, assigned, sold, transferred, conveyed or encumbered the estate or interest hereby conveyed to the said Charlotte Howell Deady in any respect or to any persons whomsoever.

It is further mutually understood and agreed between the parties hereto that from the income, rents and profits arising from said real property there shall be paid, first, the taxes and assessments ac-

crued and to accrue against and upon the same, and the interest on the mortgage now a lien on said premises and that the trustee under the will of Lucy A. H. Deady may in his discretion set aside as a sinking fund and pay on said mortgage a sum not exceeding \$1200.00 per annum; second, such other expenses as may be incident to the care of said property and the administration of the estate of Lucy A. H. Deady, deceased; third, the sum of \$150.00 per month to Mary E. Deady during the remainder of her natural life, and the sum of \$150.00 per month to Marye Thompson Deady during the remainder of her natural life; and fourth, that the remainder of said rents, income and profits shall go and be paid, during the remainder of the natural life of Charlotte Howell Deady, two-thirds to Charlotte Howell Deady and one-sixth to Hanover Deady, his heirs, executors, administrators and assigns, and one-sixth to Matthew Edward Deady, his heirs, executors, administrators and assigns.

The parties hereto further mutually covenant and agree that on the death of Mary E. Deady the sum of \$150.00 per month theretofore paid her from the income, rents and profits of said real property shall go and be paid two-thirds to Charlotte Howell Deady and one-third to Hanover Deady and Matthew Edward Deady, share and share alike, and that on the death of Marye Thompson Deady the sum of \$150.00 per month theretofore paid to her from the income, rents and profits of said real property shall go and be paid two-thirds to Charlotte

Howell Deady and one-third to Hanover Deady and Matthew Edward Deady, share and share alike.

In Witness Whereof, the parties hereto have hereunto set their respective hands and seals this 11th day of October, 1934.

(Seal) CHARLOTTE HOWELL DEADY
Party of the first part.

(Seal) MATTHEW EDWARD DEADY
Parties of the Second Part.

Witness the signature of Charlotte Howell Deady:

ETHEL F. ANDERSON
HELEN A. DODD.

Witness the signatures of Hanover Deady and Ariel Deady, his wife, and Matthew Edward Deady and Margaret Deady, his wife:

R. W. WILBUR.

State of Connecticut,
County of Litchfield—ss.

Be It Remembered that on this 11th day of October A. D. 1934, before me, the undersigned a Notary Public in and for said County and State, personally appeared the within named Charlotte Howell Deady, who is known to me to be the identical individual described in and who executed the within instrument, and acknowledged to me that she executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and notarial seal the day and year last above written.

(Seal) HELEN A. DODD,
Notary Public for Litchfield County.

My commission expires Feb. 1, 1936.

State of Oregon,
County of Multnomah—ss.

Be It Remembered that on this 2nd day of November A. A. 1934, before me, the undersigned a Notary Public in and for said County and State, personally appeared the within named Hanover Deady and Ariel Deady, his wife, and Matthew Edward Deady and Margaret Deady, his wife, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and notarial seal the day and year last above written.

.....
Notary Public for Oregon.

My commission expires:.....

State of Connecticut,
Litchfield County—ss.

I. C. Wesley Winslow, Clerk of the County of Litchfield and of the Superior Court of said State

within and for said County, which is a Court of Record, and Keeper of the Seal thereof, do hereby certify that Helen A. Dodd whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment a Notary Public within and for said State, dwelling in said County, duly appointed, commissioned, and sworn, with authority by the laws of this State to administer oaths, for general purposes, and to take the acknowledgment of deeds or conveyances, for land, tenements or hereditaments and instruments to be recorded in this State; that I am well acquainted with his handwriting and verily believe the signature to the said certificate or proof of acknowledgment to be genuine. Impression of Notarial Seal not required to be filed.

In Testimony Whereof, I have hereunto set my hand and Seal of said Superior Court at Winchester, in said County this 13 day of October 1934.

(Seal) [Illegible]

Clerk.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Grant: The rebuttal case of the plaintiff will consist in the offer of the Plaintiff's Pre-Trial Exhibits 4, 5, 8 and 9, I believe,—No. 9 and 10, the letter, the letter of Mr. Simon.

Mr. Jaureguy: No objection to these four exhibits which have just been offered by the plaintiff.

The Court: Admitted in evidence.

(Carbon copy of letter, bearing date June 7, 1935, Maguire, Shields & Morrison to Ralph W. Wilbur, Attorney for Hanover Deady and Matthew Edward [370] Deady, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 4, was thereupon marked received as Plaintiff's Exhibit 4)

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 4

June 7th, 1935

Mr. Ralph W. Wilbur,
Attorney for Hanover Deady and
Matthew Edward Deady,
Board of Trade Building,
Portland, Oregon.

In re Deady Estate.

My dear Sir:

Some months ago Charlotte Deady, widow and sole heir at law of Henderson Brooke Deady, made a certain offer of compromise to Hanover Deady and his brother, Matthew Edward Deady, relating to the various estates and interests of the parties in the Deady estate and tendered a proposed contract and deed of settlement to them through you. This contract and deed has not been executed or

accepted by your clients or delivered to us although request has been repeatedly made for such acceptance, execution and delivery.

As I heretofore informed you, this offer was not a standing one and was conditioned upon immediate acceptance and by failure on the part of your clients so to do, was of no further force and effect. In view of the failure of your clients to accept the same and to execute and deliver the contract and deed, we again notify you on behalf of our client, Mrs. Charlotte Deady, that said offer of compromise is withdrawn and request immediate return to us of the papers tendered.

We do not desire to be understood that we do not still stand ready to discuss with you and your clients the compromise of this controversy but until such discussion and agreement has been reached, our client insists upon maintaining all of her rights and claims in the premises.

Very truly yours,

MAGUIRE, SHIELDS &
MORRISON

By ROBERT F. MAGUIRE.

RFM-D

Letter, bearing date June 7, 1935, Wilbur, Beckett, Howell & Oppenheimer to Robert F. Maguire, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 5, was thereupon marked received as Plaintiff's Exhibit 5;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 5

R. W. Wilbur
H. B. Beckett
F. C. Howell
E. K. Oppenheimer
Francis E. Marsh
Robert T. Mautz
Calvin N. Souther

Wilbur, Beckett, Howell & Oppenheimer
Attorneys at Law
Board of Trade Building
Portland, Oregon

June 7, 1935

Mr. Robert F. Maguire,
c/o Maguire, Shields & Morrison,
Public Service Bldg.,
Portland, Oregon.

Dear Sir:

In re Deady Estate.

Your letter of the 7th inst. about the above received and note what you say about returning the contracts which were signed by your clients and forwarded to us for out clients.

As you know, our clients signed the first set of contracts which were forwarded to you and by you sent to your clients and these signed contracts have never been returned to us.

When the second contract was drawn, you forwarded them to your client in the East who executed them and they were forwarded to us.

I recognize that neither set of contracts have been fully executed and there has been no delivery. If the contracts signed by the respective parties are to be returned, we think the only fair and proper thing to do is to have your clients forward to you the contracts signed by our clients and we will then instruct our clients to deliver to you those which were signed by your clients.

I understand thoroughly from your letter that as the matter stands now all efforts of compromise are at an end except as we may possibly in the future discuss the matter and come to some understanding.

Relative to the inheritance taxes which the State Treasurer is now trying to impose against this estate, this seems to me very serious not only for your clients but every one concerned and since our interests lie together in this tax matter, we would like to be kept posted as to what, if anything, is to be done and if any hearing is to be had, would like to be notified so that we may be represented at the hearing. I hope it may be possible for us in the future to get together in some way for a compromise.

Yours very truly,

WILBUR, BECKETT, HOWELL &
OPPENHEIMER,

By R. W. WILBUR.

RWW/P

[Endorsed]: Filed Feb. 21, 1942.

Letter, bearing date July 15, 1933, Wilbur, Beckett, Howell & Oppenheimer, by R. W. Wilbur, to Joseph Simon, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 9, was thereupon marked received as Plaintiff's Exhibit 9;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 9

R. W. Wilbur
H. B. Beckett
F. C. Howell
E. K. Oppenheimer
Francis E. Marsh

Wilbur, Beckett, Howell & Oppenheimer
Attorneys at Law
Board of Trade Building
Portland, Oregon

July 15, 1933

Hon. Joseph Simon,
Mohawk Bldg.,
Third & Morrison Sts.,
City.

My dear Mr. Simon:

In re Estate Henderson Deady

We are informed that Mr. Henderson Deady recently died in the East and his Will is here for the purpose of probate. The last we knew, this Will had not been offered for probate and do not know the exact situation at the present time.

We note from the Will of Lucy Deady that you and Henderson Deady were made the executors of the Last Will and Testament and therefore, assume that you are still acting and alone now handling this property since your co-executor is dead.

I note from the seventh paragraph of the Lucy Deady Will that in case Henderson Deady dies without issue, the undivided two-thirds of Lot 1, in Block 212 shall vest in her two grandsons, to-wit, Matthew Edward and Hanover Deady.

Our information is that Mr. Henderson Deady died without issue and therefore, there can be no question but what the ultimate title to this property will vest in and probably has already vested in the two grandsons subject to the limitations and provisions in the Lucy Deady Will and also as the same may or may not be affected by the Will of Henderson Deady.

In the ninth paragraph of the Lucy Deady Will it is stated, referring to paragraph five of the Will, that money is to be paid to Henderson Deady as is provided in said item five and shall continue for a period of ten years after her death and that thereafter and thereupon the net income shall follow the title and ownership of said real property.

Mr. Henderson Deady left a Will in which he willed his interest in his estate to his wife, Charlotte Deady, but Mr. Henderson Deady died prior to the expiration of the ten-year period above referred to which we understand will expire with the coming month of August.

We represent the two grandsons in this matter and have taken no decided stand or position relative to this matter but an interesting question has naturally been raised and discussed as to whether or not if Henderson Deady died prior to the ten years provided for in the Will and the title of the property after said death resting in the said grandsons, Henderson Deady had any right to will to his wife any portion of the income from the property after the expiration of the ten years.

You are the executor of this estate and also the trustee for managing the same and we assume that you are aware of this situation and are probably thinking of what your position will be at the expiration of the ten-year period in August, 1933. If you have examined these Wills and have come to any conclusion we would be very glad to hear from you about the matter.

As I have said before and want to say again, the grandsons have not expressed to us any particular desire to be either hardboiled or unfair in the solution of this question but feel that as a matter of law and right that the question should be solved right or in some manner which is agreeable to all parties.

We understand that the Henderson Deady Estate is represented by Mr. Robert Maguire and he may confer with you and we will be very glad to confer with you at any time and also with Mr. Maguire if you desire and it is possible that a

solution of this entire question may be had which is agreeable to all parties.

Yours very truly,

WILBUR, BECKETT, HOWELL &
OPPENHEIMER

By R. W. WILBUR.

RWW:S

[Endorsed]: Filed Feb. 21, 1942.

Letter, bearing date July 17, 1933, Joseph Simon to Robert Maguire, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 10, was thereupon marked received as Plaintiff's Exhibit 10;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 10

Joseph Simon

John M. Gearin

Lester W. Humphreys

Edgar Freed

John C. Failing

Simon, Gearin, Humphreys & Freed

Attorneys at Law

Mohawk Building

Portland, Oregon

July 17, 1933

Robert Maguire, Esquire,

Attorney at Law,

Public Service Building,

Portland, Oregon.

Dear Sir:

I am enclosing herewith a copy of a letter just received from Mr. Ralph W. Wilbur, of the firm of Wilbur, Beckett, Howell & Oppenheimer, respecting the Lucy A. H. Deady Estate and the Estate of Henderson B. Deady.

As you are undoubtedly aware Dr. Henderson B. Deady under the terms of his mother's Will was entitled to receive two-thirds of the net income of the estate as fixed by the Will during his lifetime.

There is also in the Will of Mrs. Lucy A. H. Deady a provision which seems to authorize Dr. Deady to bequeath by Will the income that he was

to receive to his widow, if there be one, for her life.

There seems to be some uncertainty as to the proper construction of this Will so far as it affects Dr. Henderson B. Deady's interest and his right to bequeath the income after his death to his widow, by reason of the language employed in paragraphs eight and nine of the Will.

Mr. Wilbur, who represents Matthew E. Deady and Hanover Deady, has suggested that a conference should be had over the present situation, and especially what disbursement should be made of the income formerly paid to Dr. Deady after the death of Mrs. Lucy A. H. Deady, the conference to consist of Mr. Robert Maguire, Mr. R. W. Wilbur and Joseph Simon.

I would be pleased also, if agreeable to you, to have Mr. Robert H. Strong present.

May I hear from you on this subject at an early date.

Very truly yours,
JOSEPH SIMON.

JS:B

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguay: I wonder, then, if we could withdraw the copy of G, since we are putting in the original?

The Court: Yes.

Mr. Grant: We consent to that.

The Court: I think that probably there should be an amendment [371] made of the pre-trial order in that regard, because it does show that there is a copy instead of the original. I think that that should be amended.

Mr. Jaureguy: Now, I take it, your Honor,—at least, I will state that it is our understanding and our desire that if your Honor rules out some of this evidence that has been given we desire it understood that that evidence nevertheless remains, under the equity rule, for the consideration of the Circuit Court of Appeals.

The Court: Oh, yes, that is my intention.

Mr. Jaureguy: And that follows without any further action or exception on our part?

The Court: Yes. I intended that this whole record should be complete.

Mr. Jaureguy: Now, another thing that I would like to do, and that is that the Exhibits A and B were ruled out and offered under the rule. We wish now to re-offer A and B, on the theory that some of the cross-examination of Hanover Deady will perhaps throw some light as to whether or not they ought to be admissible or not, particularly the cross-examination where it was attempted to be brought out that Robert Strong had advised Hanover Deady that Mr. Charlotte Deady claimed or might claim a fee. I am just saying that to identify the evidence and not purporting to be exact in repeating it, but for that reason we reoffer these two

exhibits,—that [372] is, of course, if they are excluded and still go in under the rule.

Mr. Maguire: We submit the same objection as to their receipt on the re-offer.

Mr. Freed: May we have the original of the pre-trial order, so that we can correct it, and your Honor can initial it.

The Court: Yes.

Mr. Jaureguy: I am not urging that that ruling on the re-offer be made now, unless your Honor desires to.

The Court: Well, I will reserve it with all the rest of the rulings, the technical rulings, on the evidence.

Mr. Jaureguy: Yes.

Mr. Freed: Who shall make the change in here? I know your Honor will initial it.

The Court: Well, I don't care who makes it. I will initial it when it is made. Mr. Bailiff, will you pass up the pre-trial order. I have written in here, "Original substituted for copy, 1/24/41". [373]

Mr. Freed: I understand that your Honor will hand down an opinion on this? I mean a formal opinion?

The Court: Yes. I felt that I can advise you at this time what my holdings will be, but I think that, in order that this case may be properly presented and that the Circuit Court of Appeals will have my viewpoint on the evidence, I should like to render—

Mr. Freed: (Interrupting) And you will make your rulings?

The Court: I will make my rulings first. As soon as I get the transcript I will make my rulings on the admissibility or inadmissibility of the evidence.

Mr. Freed: And you won't want any further argument, I assume?

The Court: No, I think not, unless there is some legal point that occurs.

Mr. Freed: Well, we will be advised by your Honor.

The Court: I have given you my viewpoint on the facts. Now, if there are any rules of law that you think are sufficient to change my findings or that give a different view, [375] I will hear you on those, but as I look at it at the present time my viewpoint on the facts is probably controlling of my written opinion on the law.

Mr. Freed: Well, what I have reference to is the estoppel we have pleaded. As I understand the rule of estoppel, it wouldn't make any difference what Mrs. Deady intended in her will or what her will said, that under certain circumstances Henderson Deady could be estopped, and people claiming through him, from making certain claims. I didn't know whether we were foreclosed from arguing that.

The Court: Well, I think that we will let it go at the present, Mr. Freed, and I will make my rulings on the evidence, and then if you still think

that there are legal points that you would like to argue I will hear you.

Mr. Freed: Then we will wait to hear from the Court.

The Court: Yes.

Mr. Freed: I wanted to be sure that we were doing everything that should be done here.

The Court: Yes.

Mr. Freed: Then we are to wait to hear further from the Court as to anything we are to do in connection with the argument.

The Court: Nothing at present.

(Whereupon, at 12:15 o'clock P. M., Friday, January 24, 1941, the trial of the above entitled cause was concluded.) [376]

[Endorsed]: No. 10140. United States Circuit Court of Appeals for the Ninth Circuit. Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, Appellants, vs. Richard Howell, Appellee. Richard Howell, Appellant, vs. Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed May 16, 1942.

Paul P. O'Brien,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 10140

RICHARD HOWELL,

Appellee,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Appellants.

STATEMENT OF THE POINTS ON WHICH
THE APPELLANTS INTEND TO RELY

Pursuant to Rule 19 (6) of the Rules of this Court, the appellants present the following statement of the points on which they intend to rely on this appeal:

(1) The amended complaint does not state facts sufficient to constitute a valid cause of suit or action against defendants, and also it appears upon the face of said amended complaint that the suit was not commenced within the time required by law. Defendants' motion to dismiss the amended complaint should therefore have been granted.

(2) The Last Will and Testament of Lucy A. H. Deady clearly gives to Henderson Brooke Deady only a defeasible fee in an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Ore-

gon, subject to be defeated in favor of defendants Hanover Deady and Matthew Edward Deady by the subsequent death of Henderson Brooke Deady without issue; and since Henderson Brooke Deady died without issue, defendants Hanover Deady and Matthew Edward Deady are now the sole beneficial owners of said Lot 1, Block 212.

(3) While appellants contend that the language used in the will is clear in its meaning as set forth in Point 2, appellants also make the point that the evidence introduced at the trial proves also that it was the intention of Lucy A. H. Deady, Deceased, by the language used in her will, to give to Henderson Brooke Deady only a defeasible fee in an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated in favor of defendants Hanover Deady and Matthew Edward Deady by the death of Henderson Brooke Deady without issue after the death of Lucy A. H. Deady.

(4) The evidence introduced at the trial proves that Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady, Joseph Simon (mentioned in the will of Lucy A. H. Deady) and The First National Bank, and Charlotte Howell Deady (mentioned in the will of Henderson Brooke Deady), and Robert H. Strong, the Executor of the Estate of Henderson Brooke Deady, at all times construed the will of Lucy A. H. Deady to mean, and the said Lucy A. H. Deady to intend by said will, that Henderson Brooke Deady upon the death of the Testa-

trix received only a defeasible fee in an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated by the death of Henderson Brooke Deady without leaving issue.

(5) The evidence in this case also proves the following: Henderson Brooke Deady, from the death of Lucy A. H. Deady to the time of his own death, represented to the defendants Hanover Deady and Matthew Edward Deady that Lucy A. H. Deady, by her will, intended to and did give him (Henderson Brooke Deady) only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, which would be defeated in favor of Hanover and Matthew upon Henderson's death without leaving issue, and that under the will of said Lucy A. H. Deady he received such an estate in said property, and that upon his death without leaving issue his interest in the property would go to them, subject to the power of appointment in favor of his wife given him in said will; and Henderson Brooke Deady intended them to act upon said representations, and they did act thereon to his benefit and their detriment. Henderson Brooke Deady at all times acquiesced in that interpretation of the will, elected to accept that interest, and waived any other interest. And the Executors of the Estate of Henderson Brooke Deady accepted and acquiesced in that interpretation of the will of Lucy A. H. Deady. And Charlotte Howell Deady accepted, acquiesced in, and elected to take under that interpretation of Lucy A. H. Deady's

will. And the plaintiff is estopped to claim that Henderson Brooke Deady had any other or different estate or interest in the property.

(6) The right of action set forth in the amended complaint is barred by laches, and to allow the plaintiff at the time of the filing of the amended complaint to assert the claim made therein against defendants, or any of them, is contrary to equity and good conscience, because as the evidence in this case shows, from the death of Lucy A. H. Deady in August, 1923, up to the bringing of this suit in July, 1936, the plaintiff and the persons through whom he claims knew that the executors of the estate of Lucy A. H. Deady and the defendants herein considered and were acting upon the basis that Henderson Brooke Deady received under the will of Lucy A. H. Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, together with the power of appointment given him in said will; and until shortly before the bringing of this suit no claim was made by the plaintiff, or any person through whom he claims, that Henderson Brooke Deady received under said will any other estate in said Lot 1, Block 212. And no such claim was made until after the death of the attorney who prepared the will, the witnesses thereto, the executors named in said will, and other persons having information and knowledge concerning, and who would be able to give testimony to meet, the issues raised by the amended complaint, and until after the loss or destruction of documentary and other evidence bear-

ing on said issues. The testimony of said witnesses and said other evidence are irreplaceable.

(7) The executor of the estate of Henderson Brooke Deady and the Executor or Administrator with the will annexed of the Estate of Charlotte Howell Deady are necessary and indispensable parties in this case.

(8) Each and all the provisions of the Last Will and Testament of Lucy A. H. Deady, Deceased, are valid and should be enforced and carried out.

(9) The Last Will of Lucy A. H. Deady, Deceased, created a valid trust of said Lot 1, Block 212, City of Portland, Oregon, and defendant The First National Bank of Portland, a national banking association, since the 6th day of March, 1936, has rightfully been acting as trustee of said property and is entitled to continue, and it is its duty to continue, in the performance of its duties as such trustee.

(10) All testimony offered by defendants was, and the exhibits offered in evidence by them at the trial were, admissible; and the Court erred in excluding the portions of said evidence and those of said exhibits which it did exclude (see Court's memorandum on admission of evidence, certified record, pages 100 to 106, inclusive).

(11) The decree of the District Court should be reversed and the Circuit Court of Appeals should direct the entry of a decree dismissing plaintiff's amended complaint and further decreeing that defendant, The First National Bank of Portland, is

trustee of and should continue in the possession and management of Lot 1, Block 212, City of Portland, Oregon, as trustee, and that, subject to said trust, defendants Hanover Deady and Matthew Edward Deady are the absolute and unconditional owners of said real property, free and clear of any right, title, claim or interest on the part of the plaintiff; and said decree should further enjoin and restrain plaintiff from making any claim to said real property, or any part thereof, or to the rents or profits arising therefrom, adverse to defendants' said title, and quieting the title of defendants in and to said real property.

SIMON, GEARIN, HUMPHREYS
& FREED
EDGAR FREED
CAKE, JAUREGUY & TOOZE
NICHOLAS JAUREGUY

Attorneys for Appellants.

Service acknowledged this 11th day of May, 1942.
MAGUIRE, SHIELDS, MORRISON &
BIGGS,

Of Attorneys for the Appellee.

[Endorsed]: Filed May 13, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH
CROSS-APPELLANT INTENDS TO RELY.

Pursuant to Rule 19 (6) of the Rules of this Court, cross-appellant presents the following statement of the points on which he intends to rely on this appeal:

(1) The District Court erred in holding that the plaintiff and cross-appellant is not entitled to receive any of the income from Lot 1, Block 212, in the City of Portland, Oregon, accruing prior to the death of Marye Thompson Deady.

(2) The District Court erred in refusing to decree that the plaintiff and cross-appellant is now entitled to receive two-thirds ($\frac{2}{3}$) of the present income from said property less such charges and legacies as the Court found to exist at the date of its decree.

(3) The decree of the District Court should be modified so as to award to the plaintiff and cross-appellant two-thirds ($\frac{2}{3}$) of the present income from such property less such charges and legacies as the District Court found to exist at the date of its decree.

ROBERT F. MAGUIRE

RANDALL B. KESTER

MAGUIRE, SHIELDS,

MORRISON & BIGGS

Attorneys for Plaintiff, Ap-
pellee and Cross-Appellant.

State of Oregon,
County of Multnomah—ss:

Service of the foregoing Statement of points by copy, as prescribed by law is hereby admitted at Portland, Oregon, this 21st day of May, 1942.

SIMON, GEARIN, HUMPHREYS & FREED

Attorneys for Defendants, Appellants
and Cross-Appellees.

[Endorsed]: Filed May 23, 1942. Paul P. O'Brien,
Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER
DEADY, and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Appellants,

vs.

RICHARD HOWELL,

Appellee.

APPELLANTS' BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. JAMES ALGER FEE, *District Judge.*

SIMON, GEARIN, HUMPHREYS & FREED,
EDGAR FREED,
1111 Failing Building, Portland, Oregon; and
CAKE, JAUREGUY & TOOZE,
NICHOLAS JAUREGUY,
Yeon Building, Portland, Oregon,
Attorneys for Appellants.

MAGUIRE, SHIELDS, MORRISON & BIGGS,
ROBERT F. MAGUIRE,
723 Pittock Block, Portland, Oregon; and
JOHN SCOBLE,
55 Liberty Street, New York,
Attorney for Appellee.

PAUL P. O'BRIEN
OLE

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER
DEADY, and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Appellants,

vs.

RICHARD HOWELL,

Appellee.

APPELLANTS' BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. JAMES ALGER FEE, *District Judge.*

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court in this case is based upon 28 U.S.C.A., Sec. 41 (1), this being a suit between citizens of different states in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00. The plaintiff is a citizen of Connecticut (Par. I of

the Amended Complaint, Page 3 of the Transcript of Record) ; and the defendants are citizens of Oregon (Par. II and III of the Amended Complaint, Tr. 2, 3). The matter in controversy is a two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, and the income therefrom since July, 1935, (Par. VIII of the Amended Complaint, Tr. 11, 12) which exceeds the sum or value of \$3,000.00 (Par. IV of the Amended Complaint, Tr. 3).

While the District Court as such had jurisdiction of the case, we believe there were absent from the case necessary parties for a decision of the matter in issue. This point, which will be discussed later in this brief, was embodied in the fifth and sixth defenses of the Answer (Tr. 68).

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of the Circuit Court of Appeals to review the decree of the District Court (Tr. 178) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

CONCISE STATEMENT OF THE CASE

This suit involves the construction of the Will of Lucy A. H. Deady, the widow of Judge Matthew P. Deady who was the first United States District Judge for the District of Oregon.

The defendants-appellants contend that under the Will Henderson Brooke Deady received only a defeasible fee interest in Lot 1, Block 212, City of Portland, Oregon, which was defeated by his death without leaving issue; and the plaintiff-respondent contends that Henderson (who was his stepfather and through whom he claims) received an absolute fee-simple interest in Lot 1, Block 212, which was not defeated by his death without issue.

Mrs. Deady died on August 29, 1923, at the age of 89 years, leaving as her assets a parcel of real property in downtown Portland, Oregon, known as Lot 1, Block 212, City of Portland, which was appraised in her estate at \$275,000.00, and other assets appraised at \$1,347.02.

She left a Will, dated July 29, 1920, three years before her death.

At the time of the execution of her Will and also at the time of her death she had one living child, Henderson Brooke Deady; two deceased children Paul R. Deady and Edward Deady; two grandchildren, Matthew Edward Deady and Hanover Deady, children of the deceased son, Edward Deady; and three daughters-in-law: Amalie B. Deady (wife of Henderson Deady), Marye T. Deady (widow of Paul Deady), and Mary E. Deady (widow of Edward Deady).

At the time of the execution of Mrs. Deady's Will her son Henderson was 51 years old; and her grandsons Matthew and Hanover were, respectively, 31 and 28 years old.

At his mother's death, at the time her Will was made, Henderson Deady was, and for many years prior thereto had been, separated and living apart from his wife Amalie B. Deady, and had never had any children.

At the time of the execution of Mrs. Deady's Will and at the time of her death Lot 1, Block 212 was leased at a substantial rental under a lease that had many years to run, and was encumbered by a \$40,000.00 mortgage.

Mrs. Deady's Will

Mrs. Deady's Will is printed in full in the Transcript, pages 4-9, and in Appendix "A" to this brief, page 79. We set forth here three paragraphs of this will which we think are controlling but ask the court, at this point, to read the entire will.

"IN THE NAME OF GOD, AMEN: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

* * * * *

"Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

* * * * *

"Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons here-

inbefore named, and I give and devise the same to my said grandsons.

“Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady.”

* * * * *

The Will was admitted to probate in the Circuit Court for Multnomah County, Oregon, on the 5th of September, 1923, and Letters Testamentary were thereafter issued to Joseph Simon, her attorney, and Henderson Deady, named in the Will as executors. They administered the estate until Henderson's death, on May 28, 1933, after which Joseph Simon continued as the sole executor until his death on February 14, 1935, when The First National Bank of Portland (successor by merger to the Security Savings and Trust Company which was named in the Will as the alternative executor) was appointed executor. The Bank administered the estate until March 6, 1936, at which time the estate was closed, the Bank discharged as executor, and Lot 1, Block 212, turned over to the Bank (successor by merger to the Security Savings and Trust Company which was also named in the Will as alternative trustee) as trustee.

Henderson Deady and his wife Amalie B. Deady were divorced in 1925; and Henderson shortly there-

after married Charlotte Howell Deady who was his wife at the time of his death.

Henderson died on May 28, 1933, without leaving issue and without ever having had issue.

At his death Henderson left a will, made on October 22, 1932, in which he specifically exercised the power of appointment in respect to the income from Lot 1, Block 212, given him in paragraph Eighth of his mother's will, but made no other mention of the property. (see Tr. 22.)

Charlotte Howell Deady, Henderson's widow, died on July 12, 1935, having had no children by Henderson, and leaving a son by a former marriage, Richard Howell, the plaintiff in this case. She left a will (Tr. 24,201) which specifically mentions property in Connecticut but does not mention Lot 1, Block 212, and names Richard Howell as her residuary beneficiary.

CONTENTIONS OF RESPONDENT

The plaintiff, Richard Howell, by his Bill of Complaint seeks to establish himself as the fee-simple owner of an undivided two-thirds interest in Lot 1, Block 212, City of Portland. He claims that Henderson Deady received such an interest under the Will of Lucy A. H. Deady(in spite of the fact that Henderson died without issue), and that Henderson's interest passed to Charlotte under Henderson's will, and to the plaintiff under Charlotte's will. (If Henderson had such an interest in the of Henderson's and Charlotte's wills.)

The plaintiff, by his Complaint, further contends that the Fifth and Sixth items of the Will of Lucy A. H. Deady are invalid, and the restrictions therein placed upon Lot 1, Block 212, are void; and, further, that the Will did not place the property in trust.

Of course, unless the plaintiff establishes that he has an interest in the property he cannot complain respecting any restrictions placed upon the property by Mrs. Deady's Will.

CONTENTIONS OF APPELLANTS

The defendants are Matthew Deady and Hanover Deady (the grandsons of the Testatrix named in her Will), and The First National Bank of Portland (successor, by merger, of the Security Savings and Trust Company which is named in the Will as Executor and Trustee in succession to Henderson Deady and Joseph Simon). They contend that, under the Will of Lucy A. H. Deady, Henderson Deady received only a defeasible or determinable fee estate in Lot 1, Block 212, subject to be terminated by Henderson's death without leaving issue, and that, since Henderson did die without leaving issue, his interest in the property terminated and passed to Matthew and Hanover. They further contend that the restrictions placed upon the property under the Will are valid, and that Lot 1, Block 212, is left in trust by the Will.

As observed hereinbefore, *unless the plaintiff establishes an interest in the property, the validity*

of the restrictions and the presence of a trust are no concern of his, and therefore need not be passed upon in this case.

In addition to the defeasible interest in the real property itself the Will, of course, gives Henderson Deady the power, if he so elects, to bequeath by his own will to his wife, for the period of her life, the income which Henderson would have received from the property if he were living. There is no dispute about this, and Henderson by his will did exercise this power in favor of his wife who enjoyed the income from the two-thirds interest in the property from the time of Henderson's death until her death in 1935.

PROCEEDINGS IN THE DISTRICT COURT

To the Amended Bill of Complaint (Tr. 2-27) the defendants filed a Motion to Dismiss (Tr. 28-29) on the grounds that the Complaint did not state facts sufficient to constitute a cause of suit or action, and that it appeared upon the face thereof that the suit was not commenced within the time required by law. The Motion to Dismiss was denied (Tr. 33'), on the basis of a written opinion (Tr. 34-63) filed by the Court.

Thereafter an Answer (Tr. 64-71) was filed setting up ten separate defenses:

The first defense is that the Complaint fails to show that the plaintiff has any interest in the property.

The second and third defenses are now abandoned.

The fourth defense contains appropriate admissions and denials in respect to the allegations of the Complaint.

The fifth defense raises the point that the estate of Henderson Deady, through whom the plaintiff claims, has not been closed and therefore his executor is a necessary party to this suit.

The sixth defense raises the point that the estate of Charlotte Howell Deady, through whom the plaintiff claims, has not been closed and therefore her executor is a necessary party to this suit.

The seventh defense asserts that by the language of her Will Mrs. Deady intended to give Henderson only a defeasible fee in Lot 1, Block 212, subject to be defeated in favor of Hanover and Matthew by Henderson's death under the circumstances under which it occurred.

The eighth defense pleads practical construction of the will by interested parties.

The ninth defense pleads an estoppel by reason of representations by Henderson, and reliance thereon by Matthew and Hanover.

The tenth defense pleads laches.

A Pretrial Order was made (Tr. 72-112).

The case came on for trial on January 21, 1941. The testimony and proceedings at the trial are found on pages 198 to 478 of the Transcript of Record. During the trial the Court received all the evidence offered, but in many instances reserved its decision

thereon for later ruling. On May 21, 1941, the Court filed a written opinion on the admission of evidence (Tr. 112-130). Thereafter on November 17, 1941, the Court filed its opinion (Tr. 131-152) deciding the case in favor of the plaintiff's contentions.

Findings of Fact and Conclusions of Law were entered (Tr. 152-177), and a Decree (Tr. 178-183) was made and entered on February 24, 1942, decreeing among other things, that the Will of Lucy A. H. Deady gave Henderson an undivided two-thirds interest in Lot 1, Block 212, in fee simple which was not defeated by his death without leaving issue; that the Seventh paragraph of the Will referred only to Henderson's death without issue during the lifetime of the Testatrix; that the plaintiff Richard Howell succeeded to Henderson's fee-simple interest through Henderson's Will and the Will of Charlotte Howell Deady; that the Will did not create a trust of the property; that the Fifth paragraph of the Will creating a sinking fund for the purpose of retiring the mortgage is void; and that the Sixth paragraph of the Will restricting the encumbrance and disposition of the property is void.

Thereafter an Appeal from the Decree was duly taken (Tr. 183-185).

SPECIFICATIONS OF ERRORS

(1) The Court erred in denying the defendants' Motion to Dismiss the Amended Complaint, and in failing to dismiss said Amended Complaint.

(2) The Court erred in entering a decree in favor of the plaintiff, and in granting to the plaintiff any of the relief prayed for in the Amended Complaint.

(3) The Court erred in Findings of Fact No. X to XXIII, (Tr. 165-9) in finding: that it was not the intention of Lucy A. H. Deady by her Will to defeat, cut down, or limit the estate devised to Henderson Brooke Deady if he outlived her (X-XII) ; that upon the death of Henderson Brooke Deady a fee-simple estate passed by testamentary devise to his widow, Charlotte Howell Deady, and upon her death a fee-simple estate passed by testamentary devise to plaintiff (XIII) ; that plaintiff now has such undivided two-thirds interest, or any interest, in said property (XIV) ; that neither plaintiff nor his predecessors have ever agreed to any other or different construction of said will (XV) ; that neither Henderson Brooke Deady nor Charlotte Howell Deady nor plaintiff has at any time construed said will to mean that Henderson Brooke Deady received only a defeasible fee in said property, subject to be defeated by his death without issue (XVI) ; that Henderson Brooke Deady never represented to defendants Hanover Deady or Matthew Deady that Lucy A. H. Deady by her will intended to give Henderson Brooke Deady only a defeasible fee in said real property, which would be defeated in favor of Hanover Deady and Matthew Deady upon Henderson Brooke Deady's death without issue, or that he, the said Henderson Brooke

Deady, under said will received such a defeasible fee in said property, or that upon his death without issue his interest in the property would go to them subject only to the power of appointment in favor of his wife, given in said will, and that Hanover Deady and Matthew Deady did not act on any such representations to Henderson Brooke Deady's benefit, or to their detriment (XXII); that Henderson Brooke Deady did not at any time acquiesce in the interpretation of said will that he received only a defeasible fee in said property, and that he did not elect to accept said interest, and that he did not waive any other interest therein (XVIII); that the executors of the Estate of Henderson Brooke Deady did not accept or acquiesce in the interpretation that said will devised only a defeasible fee to Henderson Brooke Deady in said property (XIX); that plaintiff and his predecessors in interest have not been guilty of laches or undue delay in bringing this suit or making claim to be owners of an absolute fee-simple estate in said property (XX); that as early as October 26, 1923, Henderson Brooke Deady asserted that he was the owner of an absolute fee-simple estate in an undivided two-thirds interest in said property (XXI); that there had been no waiver by plaintiff or his predecessors in interest of any right to or interest in said property, and that plaintiff and his predecessors in interest made no election to accept any lesser interest than an undivided two-thirds interest in fee-simple (XXII); and that Lucy A. H. Deady did not by

her will intend to create or provide for the creation of a trust of the real property involved in this case (XXIII).

(4) The Court erred in the Conclusions of Law (Tr. 174-7) numbered 1, 2, 3, 4, 6, 7, and 8, the substance of which is the same as the Findings of Fact referred to in specification of error No. 3; and also erred in said Conclusions of Law in concluding that the plaintiff is the real party in interest and the only necessary party plaintiff to this suit (9), that neither plaintiff nor his predecessors in interest are estopped from asserting that they are owners of said property (10), that defendant The First National Bank is not vested with any rights as Trustee (11), and that defendants are bound to make accounting to plaintiff of the rent, income, and profits (12), and that decree should be entered in accordance with said Findings of Fact and Conclusions of Law (13).

(5) The Court erred in entering paragraphs I to X, inclusive, of the final decree (Tr. 178-83), the substance of which is identical with the Findings of Fact described in Specification No. 3, and in entering a decree that defendants make accounting.

(6) The Court erred in rejecting from evidence all oral expressions of Lucy A. H. Deady (Tr. 117, 264-70, 385-7, 390-4, 399-401, 406-7, 411-15), the objection having been that the evidence was irrelevant and immaterial, and incompetent to prove any issue in this case, and incompetent to prove the intent of the testatrix (Tr. 264); erred in excluding de-

defendants' pre-trial Exhibit A (certified copy of petition for probate of the Will of Henderson Brooke Deady, (Tr. 122, 205-7), and also in rejecting defendants' pre-trial Exhibit B (Inventory and Appraisal of the Estate of Henderson Brooke Deady, Deceased (Tr. 122, 212-3), the objections to each of said exhibits having been that it is entirely irrelevant and immaterial to any issue, that nothing stated therein could bind plaintiff, that it could not be construed as any act or admission of Henderson Brooke Deady (Tr. 205-6); erred in rejecting the testimony of Samuel B. Weinstein concerning conversations with Chester Dolph (Tr. 123, 224-5), the objection having been on the ground that said conversations were wholly incompetent to prove any issue and were not with any persons claiming any rights under the will of Mrs. Deady (Tr. 221). The court also erred in excluding (Tr. 129) defendants' pre-trial exhibits F (Order Determining State Inheritance Tax, Tr. 425), L (Stipulation for Settlement of Inheritance Tax, Tr. 429), M (Petition for Determination of Inheritance Tax, Tr. 433), N (Order Fixing Inheritance Tax, Tr. 436), O (Letter Regarding Inheritance Tax, Tr. 438), P (Letter to Robert F. Maguire, Tr. 441), Q (Letter from Wilbur, Beckett & Howell to Joseph Simon, Tr. 445) and R (carbon copy of letter from Joseph Simon to Wilbur, Beckett & Howell, Tr. 451). All said exhibits were rejected on the ground the same were irrelevant and immaterial (Tr. 425-451).

ARGUMENT

Both the law and the facts in this case are, we believe, quite simple and become complex only when things are read into Mrs. Deady's Will which are not there.

The basic issue in this case, and the one which determines the decision herein, is whether the Seventh item of Mrs. Deady's Will, which is as follows: "That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named and I give and devise the same to my said grandsons", refers only to Henderson's death without issue *prior* to the Testatrix's own death, or whether it refers to Henderson's death without issue at any time.

It is agreed that Henderson died subsequent to the death of the Testatrix without issue and without ever having had issue.

The natural and ordinary meaning of the language of the Seventh item is death without issue *at any time*. As Mr. Justice Gray said in *Britton vs. Thornton*, 112 U. S. 526, 332-333 (quoted with approval by the Oregon Supreme Court in *Bilyeu vs. Crouch*, 96 Or. 66, at p. 71; 89 P. 222, at p. 224; and again in *Imbrie vs. Hartrampf*, 100 Or. 589, at p. 602; 198 P. 521, at p. 525; and cited with approval in *Shadden vs. Hembree*, 17 Or. 14, at p. 25-26; 18 P. 572, at p. 577): "When indeed a devise is made to one person in fee, and in case of his death to an-

other in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator."

Not only are there no other provisions in the Will requiring the language of the Seventh item of Mrs. Deady's Will to be interpreted in any other than its natural import, but the remaining portions of the Will emphasize that Mrs. Deady intended the gift over to her two grandsons to take effect upon Henderson's death after her own without issue. And even if death at any time without issue was not the natural and ordinary meaning of the words of the Seventh item (which, of course, we do not concede), the ascertainment of the Testatrix's expressed intention from the entire Will, which is the cardinal principal accepted by all courts in the construction of wills, and to which all other rules of construction must yield, shows that she could have had no other intention in the Seventh item.

As a part of the Bill of Complaint not only do we have Mrs. Deady's Will which, we believe, shows

clearly what the Testatrix's intentions were, but we also have as a part of the Complaint (Tr. 22) the will of Henderson Deady, executed more than twelve years after his mother's death, during which period he had been one of the executors of her Will. In his will (Tr. 22) Henderson clearly recognizes that he did not receive an absolute fee-simple interest in Lot 1, Block 212, and that the only thing he had to leave under his will in respect to the property was an appointment of the income to his widow for the period of her lifetime, as specifically provided in the Eighth item of his mother's Will. This interpretation by Henderson, through whom the plaintiff claims, should be of assistance to the Court.

The Motion to Dismiss should have been sustained because it appears upon the face of the Complaint that the plaintiff has no interest in Lot 1, Block 212.

Our conclusions as to the proper construction of Mrs. Deady's Will, from the Will itself, are further corroborated by evidence, oral and written, produced at the trial, which we believe to be admissible and helpful to the Court.

Before proceeding to an analysis of the Will itself certain legal principals should be mentioned:

I.

In construing a will, the cardinal principle, accepted by all courts, is to ascertain the expressed intent of the testator from the entire instrument, and to give effect to that intention unless the same be illegal. To that principle all technical rules of construction must yield.

O.C.L.A., Sec. 18-402.

Smith vs. Bell, 6 Peters 68

Bilyeu vs. Crouch, 96 Or. 66, 69; 189 P. 222, 223

Gildersleeve vs. Lee, 100 Or. 578, 584; 198 P. 246, 248

Imbrie vs. Hartrampf, 100 Or. 589, 594; 198 P. 521, 523

Stubbs vs. Abel, 114 Or. 610, 619; 233 P. 852, 855

In Re Briggs' Estate, 186 Cal. 351; 199 P. 322

In Re Kirkpatrick's Estate, 280 Pa. 306; 124, A. 474.

Closset vs. Burtchaell, 112 Or. 585, 601; 230 P. 554, 559

Beakey vs. Knutson, 90 Or. 574; 174 P. 1149

In *Beakey vs. Knutson*, *supra*, the Oregon Supreme Court said:

"The dispute is to be solved by a proper construction of the will in question. It is elementary that the whole instrument must be taken together and construed so as to effect the intention of the man who executed the writing, owned the property and had the power to dispose of it. We cannot adopt a process of dialysis, taking here a part and there a part of the document, and base our conclusions on any single clause."

In *Bilyeu vs. Crouch*, *supra*, the Supreme Court of Oregon, in considering the meaning of the phrase

“die without issue”, said :

“The parties are agreed, and it is not necessary to cite precedents in support of the proposition, that the controlling factor in the calculation is the intent of the testatrix, to be derived from a careful examination of her testamentary declaration. This is codified in Section 7347, L.O.L.”

II.

Though it is a well-settled rule that, where property is devised in one clause of a will in language which would clearly pass an absolute fee simple estate, the estate devised cannot be diminished by a subsequent paragraph in the will unless the subsequent language shows a clear intention so to do (see O.C.L.A., Sec. 18-603); it is equally well settled that language in one clause of a will which, standing alone, would pass an absolute fee simple estate, may be validly limited by a subsequent provision in the will showing an intention to pass only a defeasible or limited fee.

Imbrie vs. Hartrampf, *supra*, 100 Or. 589, 598, 601; 198 P. 521, 524, 525.

Stubbs vs. Abel, *supra*, 114 Or. 610, 631-632; 233 P. 852, 859.

Britton vs. Thornton, *supra*, 112 U.S. 526, 532.

Reed vs. Williams, 194 Ky. 662; 240 S.W. 391.

Vanderzee vs. Slingerland and Haswell, 103 N.Y. 47; 8 N.E. 247.

Rowland vs. Warren, 10 Or. 129, 131.

In Re Barrett's Estate, 85 Neb. 337; 123 N.W. 299.

A. This rule in respect to “cutting down the fee” is not a rule of property, but one of construction.

Reed vs. Williams, supra.

B. A qualified, defeasible, or determinable fee is an estate in fee which ends or is defeated upon the happening of a specified event.

Stubbs vs. Abel, *supra*.

In Re Barrett's Estate, *supra*.

III.

Where a defeasible fee is given by the whole will, it is not a case of "cutting down a fee", or of giving effect to contradictory or inconsistent provisions, but the subsequent clause merely expresses one part of the testator's testamentary intention. Neither clause is complete within itself, but together they create the conditional or defeasible fee.

In Re Briggs' Estate, *supra*, 186 Cal. 351; 199 P. 322, 324.

In Re Barrett's Estate, *supra*, 85 Neb. 337; 123 N.W. 299, 301-302.

Rowland vs. Warren, *supra*, 10 Or. 129, 131.

For quotations from these three cases see Appendix "B", this Brief, page 83.

IV.

Where a devise of property in one clause of a will is specifically and expressly made subject to subsequent limitations, and in subsequent paragraphs of the will the estate given is made subject to defeasance, the devisee, by the first paragraph, received from the outset only a defeasible or limited fee, and the rule in respect to "cutting down the fee" has no application.

Stubbs vs. Abel, *supra*, 114 Or. 610; 233 P. 852.

Vanderzee vs. Slingerland, *supra*, 103 N.Y. 47; 8 N.E. 247.

For quotations from the *Stubbs* case, *supra*, see Appendix "C", page 85.

V.

While the construction that has been given a will by an interested party may not be controlling, it is persuasive on the courts, especially where the interested party is one through whom the litigant demanding the opposite construction is claiming.

Stubbs vs. Abel, supra, 114 Or. 610, 624; 233 Pac. 852, 857.

Moore vs. Moore, 121 Or. 48, 56; 252 Pac. 964, 967.

NOTE in 94 A.L.R., beginning at page 245.

NOTE in 67 A.L.R. 1272.

Wiggins vs. Hill, 145 Ark. 152; 223 S.W. 394, 395.

Re Estate of Kelly, 177 Minn. 311; 225 N.W. 156; 67 A.L.R. 1268.

VI.

A power of appointment created by a will lapses if the donee of the power dies before the maker of the will; consequently, if a testator by his will creates a power of appointment in X and X predeceases the testator, any attempt by X to exercise the power of appointment in his will is ineffective.

In Re Fowle's Will, 222 N.Y. 222; 118 N.E. 611.

In Re McCurdy's Estate, 197 Cal. 276; 240 P. 498.

Curley vs. Lynch, 206 Mass. 299; 92 N.E. 429.
49 C. J. 1257, Sec. 26.

It is said in *49 C. J., supra*, at page 1257:

“Where the donee of a power given by the will of another dies before the testator, the power is a nullity, and an attempted exercise of it by the donee is void.”

VII.

A will speaks only from the date of the death of the testator unless a contrary intention is manifested by the language of the will.

Kaser v. Kaser, 68 Or. 153; 137 P. 187.

Bacon v. Dickinson, 199 Ky. 121; 250 S.W. 807.

Pape v. U. S. Natl. Bank, 135 Or. 650; 297 P. 845.

The Oregon Court, in the *Kaser* case, *supra*, which involved the question of whether the death of a beneficiary referred to in a will meant death before or after that of the testator, said:

“Though a will, for some purposes, may be construed as speaking from the date of execution, as a general rule its expressions are supposed to give utterance to the testator’s intention at the time of his death, unless by a fair construction the language manifests a purpose to speak as of a different date. * * * The will under consideration was executed December 14, 1905, or nearly 5½ years before the testator died.”

VIII.

A. No particular language is necessary to the creation of a trust, and whether one exists is to be ascertained from the intention of the creator.

Allen vs. Hendrick, 104 Or. 202, 227; 216 P. 733.

Beakey vs. Knutson, *supra*, 90 Or. 574; 174 P. 1149.

Colton vs. Colton, 127 U.S. 300, 310.

1 Scott on Trusts, Sec. 24.

1 Bogert on Trusts and Trustees, Sec. 45.

B. Even though under a will the legal estate is not in terms devised to the trustee, the rule is that the trustee takes that quantity of estate which the purposes of the trust require.

Beal vs. Higgins, 135 N.E. 759, 760; 303 Ill. 370.

Windsor vs. Barnett, 207 N.W. 362, 364; 201 Ia. 1226.

Sherwin vs. Smith, 282 Mass. 306; 185 N.E. 17.

Blake-Curtis vs. Blake, 149 Kans. 512; 89 P. (2d) 15.

IX.

A federal court, in construing a will devising real property, will follow the rules of construction laid down by the courts of the state wherein the real property is situated; but where there is no state rule the federal court will apply its own rules of construction.

Barber vs. Pittsburgh, 17 S. Ct. 488; 166 U.S. 83.

Erie R. Co. vs. Tompkins, 58 S. Ct. 817; 304 U.S. 64.

X.

The phrase "die without issue", used by a testator in a will in which he devises property to a beneficiary in one clause and subsequently provides that if the beneficiary "die without issue" the property devised shall go over to other named persons, means death of the beneficiary at any time under the circumstances named, and is not confined to the death of the beneficiary prior to that of the testator.

A. There is an irrenconcilable conflict in the authorities as to the meaning of the phrase "die without issue", which conflict the Oregon decisions recognize when they accept the doctrine that the phrase means death of the beneficiary at any time either before or after that of the testator.

In the case of *Bilyeu vs. Crouch*, *supra*, (96 Or. 66; 189 P. 222), the Oregon Supreme Court refers to the fact that "the authorities are multitudinous on both sides of this question", and states, "we will not attempt to distinguish or reconcile them". But the court then goes on to say that in Oregon "*the question has been foreclosed by the early decision of Rowland vs. Warren*, 10 Or. 129", which the court then analyzes and interprets as holding that the phrase means death of the beneficiary at any time either before or after that of the testator. (Italics added.)

B. In addition to the several Oregon cases on the point (which will be analyzed and discussed hereinafter in detail) the following are representative of the authorities generally which hold that when a testator provides a gift over if the first taker "die without issue" death of the beneficiary under those circumstances at any time, whether before or after the death of the testator, is presumed to have been intended.

Britton vs. Thornton, *supra*, 112 U.S. 526.
U.S. 526.

Briggs vs. Hopkins, 103 Ohio 321; 132 N.E. 843.

Bacon vs. Dickinson, *supra*, 199 Ky. 121; 250 S.W. 807.

In re Brigg's Estate, *supra*, 186 Cal. 351; 199 P. 322.

St. Paul's Sanitarium vs. Freeman, 102 Texas 376; 117 S.W. 425.

Hampton vs. Newkirk, 115 A. 656 (N.J.).

Ahlfield vs. Curtis, 229 Ill. 139; 82 N.E. 276.

Restatement: Property, Sec. 267, p. 1347.

2 Alexander on Wills, Sec. 950, 1026-7.

2 Jarman, Wills (6th Ed.) 719: "The general rule is that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator."

O'Mahoney vs. Burdette, L. R. 7 H. L. 388: This case established the law of England on the point, and its holding on this point has been cited with approval by the United States Supreme Court (*Britton vs. Thornton, supra*, and other cases), and by the courts of many states.

C. Even in those jurisdictions where the words "die without issue", standing alone, are presumed to mean death prior to that of the testator, this is only a rule of construction and the courts will lay hold of "the slightest indications" in the will to overcome the presumption and to give effect to the language according to its natural import, namely, death at any time, either before or after that of the testator.

In re Carother's Estate, 161 Cal. 588; 119 P. 926.

In re Barrett's Estate, *supra*, 85 Neb. 337; 123 N.W. 299.

Vanderzee vs. Slingerland, *supra*, 103 N.Y. 47; 8 N.E. 247.

Chapman vs. Moulton, 40 N.Y. Supp. 408; 8 App. Div. 64.

In re Mebus' Estate, 273 Pa. 505; 117 A. 340.
In re Clifton's Estate, 205 Ia. 913; 218 N.W. 926.

In the Matter of Cramer, 70 N.Y. 271.

In re Kirkpatrick's Estate, *supra*, 280 Pa. 306; 124 A. 474.

In re Haydon's Estate, 334 Pa. 403; 6 A. (2d) 581.

For quotations from some of these cases see Appendix "D", page 87.

D. The following are all the Oregon cases which deal with the phrase "die without issue", or words of similar import, when used in wills:

Rowland vs. Warren, *supra*, 10 Or. 129.

Buchanan vs. Schulderman, 11 Or. 150; 1 P. 899.

Shadden vs. Hembree, *supra*, 17 Or. 14; 18 P. 572.

Love vs. Walker, 59 Or. 95; 115 P. 296.

Kaser vs. Kaser, 68 Or. 153; 137 P. 187.

Bilyeu vs. Crouch, *supra*, 96 Or. 66; 189 P. 222.

Imbrie vs. Hartrampf, *supra*, 100 Or. 589; 198 P. 521.

We shall now review these Oregon cases.

Rowland vs. Warren, supra (10 Or. 129).

In this case the testator devised certain real property to his daughter, Mary E. Hembree, "to her and her body heirs forever", and by a later clause in the will provided: "I further will that if my daughters, Martha Ann and Mary E. Hembree, die without children the land shall revert back to my other heirs". Mary survived the testator, and died leaving children. During Mary's lifetime an execution on a judgment against her was levied and the

land was sold. The court held (p. 132) :

“It follows that Mary E. Hembree took either a fee simple or a fee simple conditional, defeasible on the contingency of her dying without leaving children, with a limitation over by executory devise. As such contingency did not happen, she held the whole estate, and the sale of the estate, under the judgment against her, conveyed a good fee simple title to the purchaser. The fact that the sale was made before the period had arrived at which the contingency was to happen or fail, does not affect the title. The purchaser took the estate subject to be defeated by the happening of the contingency.”

The Oregon Supreme Court, in a much later case (*Bilyeu vs. Crouch*, *supra*, which will be discussed in detail presently), considering again the question of whether the phrase “die without issue” referred to death in the lifetime of the testator or death at any time, said that “in this state the question has been foreclosed by the early decision of *Rowland vs. Warren*, 10 Or. 129”, and went on to point out that the inference to be drawn from the opinion in the *Rowland* case was that if Mary had died without children the estate devised to her would have been defeated—in other words, that though she survived the testator she still took only a defeasible fee, subject to be defeated by her own death without children at any time.

Buchanan vs. Schulderman, *supra* (11 Or. 150; 1 P. 899).

The will of the testator gave property to his two daughters “for the term of their natural lives, and

after their death, or the death of either of them, the shares of the one dying, to her children in fee-simple, the children of each daughter to take one-half thereof, or in case of the death of either of said daughters, without issue, then the children of the other daughter to take all of the same * * *.” The court held that when the testator in his will provided that if either of the daughters should die without issue the property should go to the children of the other, “this language, uncontrolled, * * * must be construed to import a definite failure of issue—that is, dying without lineal descendants surviving after the death of the tenant for life.”

Shadden vs. Hembree, supra (17 Or. 14; 18 P. 572).

The testator, in the second clause of his will, devised his farm to his son; in the third clause he devised his town property to his wife; in the fourth clause he provided that his wife should have the control and management of all of his property during her life, and it should then go to his son “except as herein provided”; and in the sixth clause testator provided, “It is my will that in the event that my beloved wife and son, Henry M. Hembree, shall die before my son shall become twenty-one years of age, that it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event mentioned, I do so will and bequeath the same to him * * *”. The testator died in 1876, his widow in 1880, and his son in 1884. The court refers to the Oregon statute providing that the courts in

construing wills shall give due regard to the intention of the testator, and refers to the statement by Chancellor Kent that the intention of the testator is to be gathered from the whole will. The court goes on to say that the sixth clause of the will must be read in connection with the second and fourth clauses, and that, taking them together, the testator meant that his wife should have the use of all of his property during her widowhood and it should then go to his son, but that in the event of the death of both his wife and son before the son reached the age of 21 years of age, the property should go to the nephew, Frank Shadden. The court then considers the rule that a gift over simply in the case of "the death" of the first taker, without any other condition, refers to death in the lifetime of the testator, in the absence of a contrary intention indicated in other parts of the will; and then the court cites the rule laid down by the Supreme Court of the United States in *Britton vs. Thornton* (hereinbefore discussed), which adds to the above-mentioned rule the further rule that if the death of the first taker is coupled with other circumstances, such as death without issue, death at any time is meant, in the absence of expressions in the will to the contrary, and the Oregon court then decides that in the sixth paragraph of the will the testator did not mean death of the son only in the lifetime of the testator.

Love vs. Walker, supra (59 Or. 95, 115 Pac. 296)

The testator directed that his estate be divided

into six equal shares, and gave one share to each of his six named children and grandchildren, one being his son, Green C. Love. In a codicil to the will the testator provided:

“I hereby will, decree and declare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue born alive and living at the time of his death, then the said devise or legacy to him shall belong and go to the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will.”

In a suit by Green C. Love against the other devisees plaintiff contended that he, having survived the testator, received by the will an absolute fee simple interest in the property, because the condition of his dying “without lawful issue” meant his death prior to that of the testator, and not his death at any time. The defendants, on the other hand, contended that the phrase meant his death at any time. The court quotes (59 Or. at p. 102; 115 Pac. at p. 299) from *Jarman on Wills*, 6th Ed., p. 719, to the effect that where the context is silent the words refer to the death of the first taker at any time, either before or after that of the testator. It also quotes from *Rood, Wills*, Section 653, that the intention that the words refer to death after the death of the testator may be inferred from other provisions in the will.

The court mentions and quotes from conflicting

authorities with regard to the meaning of the phrase, but makes no attempt to reconcile the conflicting decisions, basing its decision "on what is believed to be the purpose of Lewis Love respecting the objects and the extent of his bounty." The court held that the testator, by the phrase "death without lawful issue", referred to the first taker's death *at any time*, whether before or after the testator's own death.

In commenting upon this decision, the Supreme Court of Oregon, in the later case of *Bilyeu vs. Crouch, supra* (which will be discussed in detail presently), cites the case as definitely holding against the presumption of substitutionary intent, and states that Green C. Love's estate should have been described as a "defeasible fee" which was defeated by events occurring after the testator's death. Judge Burnett dissented in the Love case, but his dissent is authority equally as strong as the prevailing opinion against the substitutionary intent presumption. While he held, in the dissenting opinion, that Green C. Love had an absolute fee at the time of the suit, that holding was based upon Judge Burnett's contention that although Green C. Love had by the will and codicil taken only a defeasible fee, the condition of defeasance was his death without issue prior to January 1, 1907 (the testator having provided that trustees should hold the property until that date, when it should be distributed to the devisees), and he was alive on that date.

Kaser vs. Kaser, supra (68 Or. 153; 137 P. 187).

The first and second paragraphs of the will left all of the testator's property to the testator's widow for life, and provided that on her death it should be divided among the testator's seven children. The third paragraph provided that "in the event that any of my children * * * die leaving lawful issue, it is my will that said issue take the share thereby left to their parent; providing, however, that if any of my children should marry and die leaving husband or wife surviving but no issue, it is my will that such surviving husband or wife of my child or children, as the case may be, take nothing by this will." One of the children of the testator died after the testator's death, but during the lifetime of the testator's widow, leaving a widow of his own but no issue.

This was a suit by the son's administratrix and widow against his mother to establish an interest in the personal property in his father's estate. The son's widow contended that inasmuch as he survived his father he became the absolute owner of one-seventh of the real property (subject to his mother's life estate) even though he subsequently died without lawful issue, and therefore she, as the son's administratrix and wife, succeeded to his interest in the property upon his death. The court held, however, that when the testator referred to the death of any of his children without issue he had reference to their death at any time and not merely death prior to his own.

The decision is clearly against a presumption of substitutional intent.

Bilyeu vs. Crouch, supra (96 Or. 66; 189 P. 122)

Here the first clause of the will gave the testatrix's husband the sole use of her half of a donation land claim during his natural life, and in the third paragraph provided: "I give and bequeath unto my two sons, Frank Ingram and John L. Ingram, and their heirs male of their body, my donation land claim aforesaid, subject to the life estate of my husband * * *. But in case the said Frank and John L. Ingram or either of them should die without issue, then said lands bequeathed to them shall be equally divided between my daughters, Anna Ingram and Mary Jane Ingram * * *."

The testatrix died in 1888; her husband in 1889; her son Frank in 1905. Plaintiff, in a suit to quiet title, claimed through deeds from Frank, who died without issue after the testatrix. The defendant claimed through Anna.

The court held for the defendant, on the ground that Frank had received only a defeasible fee which was defeated by his death without issue *after* the death of the testatrix.

The Oregon Supreme Court observed that the Oregon law was settled against substitutional intent, and cited with approval not only the Oregon cases of Rowland vs. Warren, supra, and Love vs. Walker, supra, as holding to that effect, but also the United States Supreme Court case of Britton vs. Thornton, supra.

The court stated the issue before it as follows: "Substantially, the contention of the plaintiffs is that the condition in the will to the effect that, if Frank Ingram should die without issue, then the land bequeathed to him should be equally divided between the daughters of the testatrix, Anna and Mary Jane Ingram, and their heirs forever, refers to the death of Frank Ingram occurring prior to the death of the testatrix. The defendant maintains that the language refers to the demise of Ingram at any time, whether before or after that of his mother, who made the will."

The Court made reference to and considered both the Oregon statute (Section 18-603, O.C.L.A.) from which the "cutting down of the fee" rule has been derived, and the Oregon statute (Section 18-402, O.C.L.A.) in reference to the intention of the testator governing the courts in the interpretation of a will.

Imbrie vs. Hartrampf, supra, (100 Or. 589; 198 P. 521)

By the third paragraph of his will, Robert Imbrie devised certain property to his son, James Imbrie. By the fourth paragraph he bequeathed certain sums of money to two of his daughters. By the fifth paragraph he gave certain sums of money to two other daughters. By the sixth paragraph he devised certain property to James Imbrie.

The seventh paragraph of the will was as follows: "I give, bequeath and devise to my son Ralph Imbrie, all the land that I own in * * * the Donation

Land Claim of Caleb Wilkins * * *, subject to the following restrictions, to-wit: Said land shall not in whole or part be sold or mortgaged until the said Ralph Imbrie is forty years of age, nor subject to his debts and should he sell or mortgage it, or any part of it, before that time, all his interest in said land shall cease and terminate, and said land shall descend to his children, if he then have any, and if not, then to all his brothers then living. *This devise to be accepted and received by him in full of any indebtedness to him, except five hundred dollars.* The encumbrance upon his land to be paid out of my estate." (Italics added).

By the eighth paragraph of the will, the testator devised a tract of land to James Imbrie. By the ninth paragraph he devised a tract of land to his son, T. R. Imbrie. By the tenth paragraph he devised all the rest, residue, and remainder of his property to all of his children, or to the children of any deceased child.

The twelfth paragraph of the will was as follows: "I further bequeath, devise and direct that should any of the above named devisees die without leaving lineal descendants, children or grandchildren, then in that case, all of the property above devised to such devisee shall go in equal shares to his or her brothers and sisters then living, or to the children of any brother or sister then deceased, by right of representation."

The purpose of this suit was to enforce specific performance of a contract under which Ralph Im-

brie agreed to sell and the defendant agreed to buy a part of the property devised to Ralph in the *seventh paragraph* of his father's will. The defendant had refused to complete the purchase upon the ground that Ralph did not, under the will, receive, and therefore could not convey, an absolute fee simple title.

Ralph had passed the age of 40 years and had not, prior thereto, violated the restrictions imposed by the seventh paragraph of the will by selling or mortgaging the real property therein described or permitting the same to become subject to his debts.

The court held that under the will Ralph received a fee simple interest in the property devised to him in the seventh paragraph and that the provisions in the twelfth paragraph providing for a gift over in the event of his death under certain circumstances, were not intended by the testator to apply to the property devised to Ralph in the seventh paragraph.

The court began its opinion by pointing out:

“It is a cardinal principle of law that in construing a will the intention of the testator is the guide.”

The court observed that this principle had been written into the statutory law of Oregon in what is now Section 18-402, O.C.L.A., and also referred to the well-established rule that an absolute fee given in one clause of a will in clear and explicit terms cannot be cut down by subsequent vague and doubtful language.

The court reached the conclusion that the testator did not mean by the provisions in the twelfth paragraph to cut down the fee devised to Ralph in the seventh paragraph, because the devise to Ralph in the seventh paragraph was based upon consideration, and the testator expressly stated therein that it was conditioned upon Ralph's accepting and receiving the devise in satisfaction of the testator's indebtedness to him. In other words, the court found affirmative indications in the will that when the testator provided in the twelfth paragraph for a gift over in connection with certain devises he was not referring to the devise made to Ralph in the seventh paragraph. It would seem to be apparent that in providing in the twelfth paragraph for a gift over the testator was referring only to the devises of the residue of his estate made in the tenth clause of the will.

The court quotes and applies the rule laid down by the Supreme Court of the United States in *Britton vs. Thornton, supra*, (112 U.S. 526) to the effect that a devise to one person in fee with a gift over in the event of the first taker's death without issue presumably refers to the death of the first taker *at any time*, whether before or after the death of the testator, unless there are other provisions in the will indicating a contrary intention.

The court reached the meat of its decision in the following words :

“Whatever road we travel, and view as many precedents as we may, we necessarily come back

to the language found in the testamentary instrument."

This opinion of the Oregon Supreme Court in the *Imbrie* case confirms the rule, adopted at the outset in Oregon, that, when a will provides for a gift over to named persons on the death of the first taker without issue, the gift over takes effect upon the first taker's death at any time without issue, either before or after the death of the testator, unless controlled by other provisions of the will; and there is no presumption that the gift over is intended to take effect only upon the first taker's death prior to that of the testator.

ANALYSIS OF THE DEADY WILL

We come now to an analysis of the Deady Will (Tr. 4-9) and an application of the pertinent principles of law.

In the FIRST item of the Will the Testatrix directs the payment of her debts and funeral expenses. In the SECOND she gives directions respecting her place of burial.

The THIRD item (Tr. 4) is as follows:

"Third: *Subject to the conditions, provisions and charges thereon hereinafter made*, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon." (Italics added.)

It is clear that by this Third item the Testatrix gives Henderson *not* an absolute fee, but a fee sub-

ject to such conditions, provisions, and charges as she might thereafter place upon it. *At the very outset* of this Third item Mrs. Deady gives notice in the plainest language that Henderson's interest in the property there devised to him was subject to the conditions, provisions and charges thereafter in the will to be specified. And thereafter she did make such specifications, including a provision in the Seventh item setting out the condition upon which Henderson's interest would be defeated.

In the above respect this case is like *Stubbs vs. Abel, supra* (114 Or. 610, 233 Pac. 852), where the testator devised certain property to three devisees "subject, however, to such disposition as I may hereinafter make of any portion thereof", and *Vanderzee vs. Slingerland, supra* (103 N. Y. 47, 8 N. E. 247), where a devise was made "subject to the proviso hereinafter contained", and *Chapman vs. Moulton, supra* (40 N. Y. S. 408, 8 App. Div. 64), also involving a "subject to" provision in a will. New York has a statute like Oregon's (Section 18-603, O. C. L. A.) from which the rule against "the cutting down of the fee" is derived. In all three of these cases the courts held that the "subject to" provision gave notice that in some subsequent portion of the will there was a condition or qualification attached to the fee. See particularly the language of the *Stubbs* case in 114 Or. at page 633, 233 Pac. at page 859, and of the *Vanderzee* case in 8 N. E., at page 250. The point made in the above three cases (that the "subject to" provision indicated from the outset that the

testator intended to devise only an interest subject to defeasance) finds no contradiction, so far as we are aware, in any of the authorities.

In the FOURTH item (Tr. 5) of Mrs. Deady's Will she devised to Matthew and Hanover the remaining one-third of Lot 1, Block 212, "subject to like conditions, provisions and charges thereon".

So, at this point in her will, the Testatrix has devised to Henderson a two-thirds interest in Lot 1 subject to such limitations as she thereafter in the will placed upon that devise; and has devised to Matthew and Hanover a one-third interest in Lot 1, subject to such limitations as she thereafter in the will placed upon that devise.

In the FIFTH item (Tr. 5) the Testatrix begins to enumerate "the conditions, provisions and charges" which she has theretofore referred to. She therein directs that out of the income from Lot 1 the sum of \$150.00 per month be paid to one daughter-in-law for life, and that the sum of \$75.00 per month be paid to another daughter-in-law so long as she remain unmarried; that out of "the remainder of the income" derived from the property \$100.00 per month be paid to each of her grandsons, Matthew and Hanover; and that the rest of the income be paid to Henderson. The Testatrix then specifies that such division of the income derived from the property should continue during the lifetime of Henderson; but that before any of said income from the real property should be distributed to the beneficiaries all inheritance taxes against the estate

be paid therefrom, and that not less then \$1,000.00 and not more than \$2,500.00 per year ("in discretion of my Executors") be set aside for the purpose of retiring and paying off the mortgage debt then against the property.

By the SIXTH item (Tr. 6) of the Will the Testatrix directs that the property should not be sold, partitioned, or encumbered for a period of twenty-five years after her death, except for purposes of the improvement of the property or the renewal of the existing mortgage.

The contention has been made that this restriction against disposal or incumbrance of the property is void. While it is the law of Oregon that an absolute restraint on the alienation of property devised in fee simple absolute is void, there is a considerable question as to the application of that principle to the Sixth item of the Deady Will. Assuming, however, that the restrictions are void, the only effect is to free the property of those restrictions, and it can have no bearing whatever on the question of whether upon Henderson Deady's death without issue the gift over to Matthew and Hanover took effect.

We now come to the SEVENTH item of the will, which presents the vital issue in this case. It reads as follows :

"Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons here-

inbefore named, and I give and devise the same to my said grandsons."

The natural and reasonable meaning of this language can be only one thing—that if at the time of Henderson's death he had no children, grandchildren, or other descendants, the undivided two-thirds of Lot 1, which had been devised to him in the Third item of the will "subject to the conditions, provisions and charges thereon hereinafter made", should thereupon vest in Matthew and Hanover.

Before proceeding to a further consideration of this Seventh item we shall examine the remainder of the will, and return to a discussion of this Seventh item when we consider the will "in its entirety and from its four corners".

By the EIGHTH item the Testatrix "authorizes and permits" Henderson to bequeath by will to his wife, if he leaves one, the income which he would have received from the property had he been living. This is an ordinary power of appointment, indicating very clearly that the Testatrix had not intended theretofore in the will to give Henderson an absolute undefeasible fee in the property. Otherwise it would have been entirely unnecessary for her to give him the added power of appointment, since an absolute fee, if he had one, would certainly have carried with it the right of disposition by will, without any added permission from the testator.

The presence of this power of appointment demonstrates beyond a question or doubt, we believe, that in the Seventh item Mrs. Deady was refer-

ring to Henderson's death *after* her own, and was not simply providing for a substitution of Matthew and Hanover for Henderson if he predeceased her. The power of appointment would not come into existence until Lucy A. H. Deady died and her Will took effect. If Henderson had predeceased her the attempted exercise of the power by Henderson in his will would have been entirely ineffectual.

As stated in 49 *C. J.*, at page 1257, *supra* :

“Where the donee of a power given by the will of another dies before the testator, the power is a nullity, and an attempted exercise of it by the intended donee is void.”

And, as pointed out in *In Re McCurdy's Estate*, *supra*, (197 Cal. 276; 240 P. 498, 501), a power of appointment given by will cannot come into existence until the death of the giver of the power, and, if the donee, the only person who could exercise the power, is dead before that time, the power itself never comes into existence.

As Judge Cardozo put it in *In Re Fowle's Will*, *supra*, (222 N. Y. 222; 118 N. E. 611) :

“It is true that a power created by will lapses if the donee of the power dies before the maker of the will. * * * That is because a will has no effect till the death of the testator. Whatever power it creates, comes into being at that time.”

It is to be observed that the Eighth item of the Deady will does not present an instance in which a testator has specifically bequeathed property to

whomsoever another person has named in his will, thus bringing into operation the doctrine of incorporation by reference.

The Pennsylvania Court in *In Re Kirkpatrick's Estate, supra*, (280 Pa. 306; 124 A. 474), pointed out that the provision in the will there under consideration giving the first taker the right to select the charities which should have the property if the first taker died without children "necessarily visualizes" the first taker as living after the death of the testatrix.

In the NINTH item the Testatrix limits to a period of ten years after her death the division of income which she had made in the Fifth item between her grandsons and her son. (In the Fifth item she had provided that the division there made should continue during Henderson's lifetime). It is then provided that after the 10-year period the income remaining, after the payment of the specified monthly legacies to the Testatrix's daughters-in-law, should be distributed according to the ownership of the property (instead of at the rate of \$100.00 per month to each of the grandsons with the remainder to Henderson as provided in the Fifth item). The grandsons owned a fee in one-third and Henderson owned a defeasible fee in two-thirds of the property. The Ninth item further directs that the Executors of the Will should, at their discretion, provide, out of the residue of the income bequeathed to Henderson in the Fifth item, funds "to further any legitimate or worthy ambition or aim * * which my gand-

sons * * may undertake or entertain.”

In the TENTH item the testatrix devises to Henderson a specific parcel of real property, which is not mentioned in the Seventh item. *This Tenth item shows how the Testatrix dealt with a devise to Henderson which she intended to be absolute.*

By the ELEVENTH item the testatrix's library is bequeathed to Hanover.

The TWELFTH item gives the residuary estate two-thirds to Henderson and one-sixth each to Matthew and Hanover, without any qualifications.

In the LAST item of her will, the Testatrix appoints Joseph Simon and her son Henderson “to be the executors of this my Last Will and Testament, and also trustees to manage my estate”, and appoints the Security Savings & Trust Company (now The First National Bank) to “complete the execution of said estate, and serve as trustee thereof” in the event of the death, resignation or disqualification of both said executors and trustees.

We now return to a discussion of the Seventh item of the will. *The ultimate question which the Court must decide in this case is what the testatrix meant in the Seventh item*, where she provides: “That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.” Giving the natural and reasonable meaning to this language, it would seem clear that the Testatrix meant that if

at the time of Henderson's death he had no issue the undivided two-thirds of Lot 1, Block 212, which had been devised to him in the Third item of the Will, "subject to the conditions, provisions and charges thereon hereinafter made", should thereupon go over to and vest in Matthew and Hanover.

It is contended by the plaintiff-respondent, however, that the Testatrix meant the gift over to be effective only if Henderson died without issue prior to the death of the Testatrix.

It will be observed that in the Seventh item the Testatrix provided that upon the happening of the contingency (Henderson's death), the undivided two-thirds should "*vest*" in her grandsons. Necessarily, the Testatrix was referring to a contingency occurring *after her own death*. Upon Henderson's death prior to her own death, and so prior the taking effect of her will, the property could not "*vest*" in Matthew and Hanover.

The Oregon Sureme Court, in *Love vs. Walker, supra*, (59 Or. 95; 115 P. 296) pointed out that the gift over provision in the will there under consideration provides that on the happening of the designated contingency the property should pass to the testator's remaining devisees in the proportion in which they "hold" the testator's estate, and observes that these devisees could not "hold" any part of the testator's estate until after the testator's death, and that consequently the testator must have referred to the first taker's death subsequent to his own.

So, only upon Henderson Deady's death occurring *after* the Testatrix's could the property "vest" at that time in Matthew and Hanover. The fact that Henderson in the Last item of the Will is appointed an executor and trustee of the Will, and that the substitute trustee is named merely to "complete the execution of said estate, and serve as Trustee thereof", is an indication that the Testatrix was grounding her will upon the assumption that Henderson would survive her. The authorities recognize that the appointment of the first taker as an executor of the will indicates that the testator, in providing for a gift over upon the death of the first taker, was referring to the first taker's death after that of the testator. See *Ahlfield vs. Curtis, supra*, (229 Ill. 139; 82 N. E. 276) and *St. Paul's Sanitarium vs. Freeman, supra*, (102 Tex. 376; 117 S. W. 425).

It is of interest to note that if Mrs. Deady had intended that the gift over should take effect only in the event of Henderson's death prior to her own, it would have been unnecessary to make a provision for a gift over to Matthew and Hanover, because that would have been the course of descent under the Oregon laws of descent and distribution.

In *Briggs vs. Hopkins, supra*, (103 Ohio 321; 132 N. E. 843) the Ohio Court found this an indication of the testator's intention that a gift over on "death without issue" should take effect on the death of the first taker after the death of the testator.

In the present case, if Henderson had predeceased his mother without issue, Matthew and Hanover would have taken *both* the property devised to Henderson in the Third paragraph and that devised to him in the Tenth paragraph, although the condition contained in the Seventh paragraph applies only to the property devised by the Third paragraph. Mrs. Deady certainly intended, by the Seventh paragraph of her Will, that a condition should attach to the Third paragraph which was not applicable to the Tenth paragraph. Under the trial court's decree, exactly the same condition was attached to both—death of Henderson without issue prior to his mother's death.

TRUST

So far we have discussed the Deady Will as if Henderson received a legal estate in Lot 1, Block 212, and we have so far not taken advantage of the construction which must follow if legal title to Lot 1 passed to the trustees named in the will, and Henderson took only an equitable estate. If Henderson received only an equitable estate, that is, if the will set up a trust of the property, all the authorities agree that the gift over would refer to Henderson's death without issue *after the Testatrix's death*, unless other provisions in the will showed a contrary intention.

We think that the will did, without doubt, place the property in trust.

It is clear, of course, that there may be a conditional or defeasible *equitable* fee just as there may be a conditional or defeasible legal fee in real property. The Supreme Court of Oregon had such an estate before it in the case of *Stubbs vs. Abel*, supra, (114 Ore. 610; 233 P. 852). There the legal title was in the trustee and the court held that the beneficiary had a defeasible, equitable fee, which was defeated.

It is true that the Deady Will does not specifically in words devise the real property to the trustees; but it is clearly the law that the legal estate need not in terms be devised to a trustee in order to create a trust, if the intention of the testator to create a trust is manifested in the will. No technical language is necessary to the creation of a trust. The trustees under such circumstances will take such title as the purposes of the trust require. See the authorities cited on this point on pp. 22-3 hereof.

In addition to the fact that the Testatrix appoints two individuals and one banking institution as "trustees"—naming them as such—"to manage my estate", it is difficult to read the provisions of the Deady Will without reaching the conclusion that the Testatrix meant her trustees named therein to have title to the property and act as real trustees, because they could not otherwise perform the responsibilities imposed upon them by the Will. We refer particularly to the monthly payments to be made to beneficiaries; to the creation of a sinking fund, clearly within the discretion of the trustees; and to the discretionary payments to further any

“legitimate or worthy ambition or aim” of Matthew and Hanover. All the elements that go to make up a trust are present—the *res*, the *beneficiaries*, the *trustees* and the *duties of the trustees*. The duration of the trust was the *lives* of Henderson Deady and the Testatrix’s daughters-in-law, Mary E. Deady and Marye Thompson Deady, mentioned in the Fifth item of the will.

INDEFINITE FAILURE OF ISSUE

It has also been contended that if the gift over be construed to take effect upon Henderson’s death without issue *after* the death of the Testatrix, such would involve an indefinite failure of issue, and would therefore violate the rule against perpetuities. The argument is that the phrase means not what it says—a gift over upon death without issue—but a gift over when the issue left by the first taker becomes extinct.

This old common law rule of indefinite failure of issue was based upon the existence of estate’s tail and the recognition of their validity. But estate’s tail were abolished in Oregon even before Oregon became a state. *Lytle vs. Hulen*, 128 Or. 483, 506-509; 275 P. 45, 52-53.

We may therefore safely state that the rule of indefinite failure of issue is not in force in Oregon. The trial court reached same conclusion (Tr. 45-6, 61-2).

On the general subject of indefinite failure of issue, see 6 Columbia Law Review 175; 39 Yale Law Review 332.

EVIDENCE ON MEANING OF WILL

The construction which we place upon this Will differs so radically from that placed upon it by the trial court in ruling upon the motion to dismiss, that at the trial we felt justified in offering parol evidence, as an aid to construction. We feel, too, that no one can study the opinion of the learned trial judge on the motion to dismiss (Tr. 34-63) without being impressed with the difficulties encountered by the trial judge in construing certain phrases which by different courts and under varying circumstances have been given a variety of meanings.

We accordingly introduced at the trial evidence tending to show:

First: The feelings of love and affection of Mrs. Deady toward her grandsons, her desires with respect to her property, and related matters, as disclosed by her declarations and conduct during her lifetime.

Second: The construction placed upon the Will by interested parties, including Henderson, Charlotte, and Robert H. Strong, Henderson's Executor.

Third: Reliance by Matthew and Hanover upon representations made by Henderson, thus constituting an estoppel.

All the evidence offered at the trial was reported, subject to objections, rulings by the court being reserved, and is now in the record (Tr. 198-478). Subsequent to the trial the court rendered a memorandum on the admission of evidence (Tr. 112-30) in which disposition was made of this evidence as indicated in our Specification of Errors, *supra*, p. 10.

DECLARATIONS OF TESTATRIX

(a) Admissibility of the Evidence

We believe all evidence of declarations and conduct of Mrs. Deady offered by us, and rejected by the trial court, was admissible, to show the Testatrix's feelings toward her grandsons and her desires with respect to her property, if not as direct evidence of her intentions. In support thereof we rely upon the following authorities: O.C.L.A., Sections 2-214 and 2-218; *Crown Company vs. Cohn*, 88 Or. 642, 172 P. 804; *Schramm vs. Burkhart*, 137 Or. 208, 2 P. (2d) 14; *Stubbs vs. Abel, supra*, 114 Or. 610, 233 P. 852; *Calder vs. Bryant*, 282 Mass. 231, 184 N.E. 440, 94 A.L.R. 18; 94 A.L.R. 26, 263, 272, 280.

The above statutes, together with quotations from the above authorities, are set forth in Appendix "E", page 89.

(b) The Evidence

The learned trial judge in his opinion denying the motion to dismiss the bill of complaint stated as one of the reasons for the construction placed

upon the Will by him that Henderson was obviously the "favorite" (Tr. 61). This conclusion was based on the fact that the Will devised other property to Henderson outright. This fact, even though such other property were valuable, would not, in our opinion, justify a conclusion that Mrs. Deady intended Henderson to obtain an unconditional fee in two-thirds of the property here involved; but it later developed (Tr. 93) that all the other property of the estate, including a law library bequeathed to Hanover, was valued at only \$1,347.00.

Limitations on space prevent us from detailing the evidence, or even giving a summary thereof, but we believe it will not be disputed that the evidence (which, of course, was introduced after the trial judge had stated that Henderson was the favorite) clearly shows that Henderson was not the favorite, but that Mrs. Deady was in fact disappointed in him, particularly with his domestic life (Tr. 268). It clearly shows that her grandchildren, Matthew and Hanover, were her favorites, and that to them she wished this property ultimately to go, to be held intact by them "as a monument to Judge Deady". See, particularly, Transcript, pages 260-8, 341-3, 380-401, 405-7, 411-5.

At the conclusion of the defendants' case and prior to rebuttal testimony by plaintiff, the trial judge gave an oral opinion regarding his conclusion on the facts, and among other things said:

"I have arrived at the conclusion that the main point in Mrs. Deady's consideration at the time that she drew the will was that she desired to keep this property intact for an indefinite period of time, and that conclusion is borne out by the testimony in this case" (Tr. 454).

And the court added:

"It is unfortunate, even in my own thinking, the main desire of the testatrix to hold this property, to give the benefit to her family in perpetuity, cannot be carried out, but I think it was a natural desire which was frustrated by the rules of law, . . ." (Tr. 454-5).

And in the court's final opinion, in referring to the desires of Mrs. Deady as disclosed by the above evidence, the court says (Tr. 120):

"It is certain that she was impelled by a desire to have the property kept intact as a monument to Judge Deady, which is one of the clear expressions of the will."

CONSTRUCTION OF WILL BY HENDERSON DEADY AND OTHER INTERESTED PARTIES; REPRESENTATIONS BY HENDERSON, RELIANCE THEREON; WAIVER AND ESTOPPEL.

(a) Admissibility of the Evidence

The following authorities sustain our contention that evidence was admissible of the conduct and representations of Henderson Deady, the reliance of Matthew and Hanover thereon, of waiver and estoppel (all admitted by trial court), and of the representations and conduct of Henderson's executor, Robert H. Strong (rejected by trial court): O.

C.L.A., Sections 2-206, 2-210, 2-228; *Sperry vs. Wesco*, 26 Or. 483, 491, 38 P. 623, 625; 67 A.L.R. 1272, 1273, 1277; 94 A.L.R. 26, 245; *In re Estate of Daniel Kelly*, 177 Minn. 311, 225 N.W. 156, 67 A.L.R. 1268, and cases cited; *Stubbs vs. Abel*, *supra*, 114 Or. 610, 623-4, 233 P. 852, 856-7; *Moore vs. Moore*, 121 Or. 48, 56, 252 P. 964, 967.

These statutes, together with quotations from the above authorities, are set forth in Appendix "F", page 94.

(b) Evidence

The testimony on the representations of Henderson and, after his death, of his Executor, may briefly be summarized by stating that at no time prior to the death of Henderson on May 28, 1933, and indeed at no time prior to the death of Charlotte, July 12, 1935, had anybody ever asserted or claimed that after Henderson's death without children Hanover and Matthew would not own the property in fee simple (Tr. 332), and repeated declarations had been made to the contrary.

It will be recalled that under the Fifth paragraph of the Will payments of the residue of the income were to be made to Henderson only after the monthly payments to the widows and to Matthew and Hanover, and after the payments of inheritance taxes, and after the creation of a sinking fund for retirement of the mortgage, and, under the Ninth paragraph, after the payments of any discretionary funds for the furthering of any

“worthy ambition or aim” of Matthew and Hanover.

It will thus be seen that since all of the above sums were payable prior to the payment of any sums to Henderson, the payment of income to him might be deferred several months, and thereafter the amount of his income might be seriously curtailed by carrying out the provisions for the sinking fund for the mortgage and the provision providing funds for some “legitimate or worthy ambition or aim” of the two grandsons. Accordingly, very shortly after the death of Mrs. Deady, Henderson requested Hanover and Matthew to agree to a modification of the provisions of the Will by waiving some of these priorities, and particularly by postponing the carrying into effect of the sinking fund provisions (Tr. 340). Hanover testified that Henderson “kind of led up to finally what he did ask me for, that he needed some money, wanted some money to live off of . . . and Mr. Simon said that it would be all right if he got the consent of Matthew and I” (Tr. 274). As Henderson’s argument why Hanover and Matthew should consent to such an arrangement whereby Henderson could get more money, and sooner, “he also expressed that inasmuch as Matthew and I were coming into the property some day ourselves, why, he thought it was only fair that he should get something to live off of”, and Henderson also said, “I can’t come into the property unless I have children, as you know, and I will never have any children, because I am a sick man, I can’t have children” (Tr. 275).

At an early stage of these discussions Hanover consulted an attorney, Ralph W. Wilbur, who on October 25, 1923, wrote a letter to Mr. Simon (Ex. A, Tr. 445), setting forth the position of the grandsons and stating that a "rumor" had come to him that Henderson wished to obtain advances from the estate (Tr. 446). We digress to call attention to one paragraph of that letter which it seems to us was entirely misunderstood by the trial judge. After discussing in detail the provisions of the Will referring to the monthly payments to beneficiaries, the letter says (Tr. 448) :

"It is naturally for the interests of my clients and particularly the two grandsons to have as large a sinking fund created as possible so as to pay off the mortgage, as under present family conditions, as I understand them, under Paragraph 7, the two grandsons will probably eventually own this whole property."

Referring to this letter the learned trial judge said in the final opinion (Tr. 131) :

"Controversy seems to have sprung up immediately, concerning the distribution of money and the ownership of the property, between Henderson and Hanover. Wilbur, the attorney for Hanover and Matthew Edward wrote a letter to Joseph Simon, October 25, 1923, *setting up a claim* that the grandsons would be entitled to the whole estate on Henderson's death, and Joseph Simon answered October 26, 1923." (Italics added.)

We submit that the learned trial judge has entirely misconstrued the meaning of Mr. Wilbur's letter. There was no controversy. Mr. Wilbur was

not asserting a "claim". He was merely calling attention to the fact that "under present family conditions" the two grandsons "will probably eventually own this whole property." The making of that assertion created no controversy. In fact, that was the one matter on which there was entire agreement—that when Henderson died without issue the two grandsons would come into complete ownership of the property, subject only to the charges placed thereon by Mrs. Deady's Will. Not until long after Henderson's death was any suggestion to the contrary put forward by anybody.

At any rate, due to the exhortations and requests of Henderson, and after conferences between the parties and their attorneys, stipulations were entered into from time to time whereby the provisions in the Will for the creation of a sinking fund were suspended and Henderson was given definite monthly payments in excess of what he otherwise would have received, in the absence of such stipulations. See Exhibit I (Tr. 278), dated December 18, 1923; Exhibit J (Tr. 281), dated October . . . , 1924; Exhibit K (Tr. 324), dated August . . . , 1931; and Exhibit E (Tr. 307), which will be discussed later, dated October 28, 1925.

As a result of these stipulations payments were started in December, 1923; and those to Henderson were at the rate of \$300.00 per month, and were increased to \$400.00 per month in February, 1925, to \$475.00 per month in December, 1925, to \$500.00 per month in March, 1927, to

\$750.00 per month in June, 1928, reduced to \$400.00 per month in February, 1931, and increased to \$600.00 per month in July, 1931, at which amount they continued until the date of his death, May 28, 1933 (Tr. 90). And because of the extent of these payments, although the Will provided that a sinking fund "of not less than \$1,000.00 nor more than \$2,500 per year" should be created for the purpose of paying the mortgage debt, no sinking fund was created and no payments of principal whatsoever were made on the mortgage debt until December, 1930, and at the time of Henderson's death in May, 1933, there had been paid upon the principal sums totaling only \$7,000 (Tr. 92). The cash balances in the hands of the Executors during this time were always small (Tr. 91). It is, of course, clear that payment to Henderson of funds that otherwise would have been used to retire the mortgage debt was a detriment to Hanover and Matthew, and this regardless of whether they now own the entire property in fee or only an undivided one-third interest therein.

Shortly after Mrs. Deady's death, Marye, Paul's widow, put forth the contention (Tr. 89, 281-305) that, by reason of the manner in which Mrs. Deady had obtained title to the property after Judge Deady's death, the three sons had what amounted to a vested remainder subject to a life estate in Mrs. Deady, and that, accordingly, she, Marye, as Paul's widow, was entitled to his one-third. Our course if this contention had prevailed, Matthew and Hanover

would be the owners of a one-third interest free from monthly payments to others; but Henderson, in urging the boys and their mother to oppose Marye's contentions, argued that under the Will the boys would, upon Henderson's death, own the entire property (Tr. 288-9). After suit was filed, in which Marye's contentions were opposed by Matthew and Hanover as well as by Henderson, the matter was settled by an agreement (Ex. E, Tr. 307) increasing the monthly benefits to Marye and extending them for the remainder of her life instead of, as provided in the will, until she remarried (Ex. E, Tr. 307).

In the stipulation of December 18, 1923, Exhibit I (Tr. 278) there is a reference to a "controversy" regarding the "ownership of the real estate", and it should be understood that that reference is to the controversy by which Marye claimed a one-third interest in the property (Tr. 284-5).

During the two years subsequent to Mrs. Deady's death that Henderson was in Portland, he succeeded in obtaining a divorce from his then wife, Amalie. In negotiations for this settlement both Henderson and his attorney, Chester Dolph (who was a witness to Mrs. Deady's Will), insisted in their negotiations with Amalie's attorney, Samuel B. Weinstein (Tr. 39), that Henderson "had no substantial resources" (Tr. 225), and that under the terms of his mother's Will all that Henderson had "was a power of appointment, that that power of appointment must be exercised in favor of his wife" (Tr. 226), and

Henderson stated that he would decline to exercise that power of appointment in favor of Amalie “unless some reasonable arrangement could be arrived at” (Tr. 226, 233). However, it was understood that Henderson contemplated remarrying as soon as the law would permit, and an agreement was entered into (Tr. 241) whereby Amalie was to be paid certain sums on an ascending scale beginning at \$75.00 per month and reaching \$200.00 per month after three years; and Henderson agreed (Tr. 235, 244) to exercise the power of appointment “in such manner and to the effect that the payments herein provided to be paid by him to the said Amalie B. Dedy shall be a fixed and prior charge upon the devise, estate, legacy, or interest resulting from the exercise of said power by him”—this being accomplished by Charlotte agreeing to make such payments from such income after the death of Henderson. Based upon this agreement Henderson obtained his divorce. This agreement was entered into September 14, 1925, approximately a month before the agreement settling Marye’s controversy, Exhibit E (Tr. 307), which was executed October 28, 1925.

Between the dates of the above two agreements—that with Amalie and that with Marye—another matter arose. Henderson, as we have pointed out, in connection with the execution of the various stipulations, had continuously been citing the fact that upon his death the two boys would obtain the entire property in fee simple. However, rumors had come to the attention of Hanover that Charlotte had had

a child by Henderson. It occurred to Hanover that if such was the case Henderson would probably not "die without issue", and accordingly Hanover and his brother would not come into ownership of the two-thirds interest upon Henderson's death. Accordingly, shortly before October 28, 1925, when the Marye agreement was signed, this fact was mentioned to Henderson by Hanover (Tr. 316). And Henderson said "he didn't have any children by anybody, it wasn't so." At Hanover's request Henderson provided an affidavit, dated October 29, 1925, 1925, which, omitting the formal parts, reads as follows (Ex. H, Tr. 322) :

"I, Henderson Brooke Deady, being first duly sworn, say on oath, that I am a son of Lucy A. H. Deady, deceased, and one of the heirs at law of her Estate. I further depose and say that no child or children have ever been born to me, and that I have not had and have not now any issue by marriage or otherwise."

"HENDERSON BROOKE DEADY."

The trial court in its final opinion (Tr. 140-2, 147-8) explains Henderson's assertions in the controversy with Amalie and also the above affidavit by stating that if Henderson died before marrying Charlotte, but after his divorce from Amalie, Hanover and Matthew would be his heirs and would inherit his two-thirds interest in the property, and for this reason they were interested in knowing whether he had any children. But we confidently state that there is not an iota of evidence justifying such a conclusion. The evidence is clear that Matthew and

Hanover were concerned with the question of Henderson's possible issue only because of the provision in the Will that if Henderson "die without issue" they would obtain the property.

Shortly before leaving for the East, and after he had obtained his divorce, and after the above affidavit was executed, Henderson endeavored to persuade Hanover to make an agreement whereby if Henderson died before he married Charlotte—and thus before he could execute the power of appointment in her favor—Charlotte would nevertheless be taken care of from the income from the property (Tr. 320, 418), but Hanover indignantly refused to enter into any such agreement.

Henderson died on May 28, 1933, "having had no issue and leaving no issue him surviving" (Tr. 80). Sometime thereafter Hanover was in Joseph Simon's office discussing matters generally concerning the estate, and Mr. Simon "made the remark that they were getting too much money back there", which Hanover construed to mean Amalie and Charlotte Deady. He inquired further, but Mr. Simon, very properly, said, "I can't do anything, Hanover. I am the Executor of the will. You will have to see somebody else" (Tr. 376). Those remarks started a "train of thought" (Tr. 329, 347-53, 363-5, 376). So he consulted Ralph Wilbur. As a result of this conference Mr. Wilbur wrote a letter to Mr. Simon (Exhibit 9, Tr. 469). After pointing out that since Henderson died without issue "there can be no question but what the ultimate title to this property will vest

in and probably has already vested in the two grandsons", he suggested "an interesting question" as to whether the fact that Henderson had died during the ten-year period prevented an exercise of the power of appointment. Hanover at the trial denied that any such idea had been in his mind, or that he had suggested it to Mr. Wilbur (Tr. 349-50). After negotiations, Mr. Wilbur, on behalf of the grandsons, prepared a compromise agreement but it was rejected (Tr. 330-1). A counter proposal was executed by Charlotte and forwarded to Mr. Wilbur, who apparently approved it. It was signed by Matthew Deady. However, when Hanover went to Mr. Wilbur's office and read it he refused to sign it "because it was the same thing that the will covers" (Tr. 331). Asked what he meant by this he explained (Tr. 332) :

"Well, that Charlotte Deady should receive two-thirds of the income for her life, as given Henderson the right to give her at the time of his death, and it didn't give Matthew and I any more money out of it. It also was agreed that we owned the property, the same thing as the will said."

Up to that time he testified nobody had ever asserted or claimed that after Henderson's death without issue Matthew and Hanover would not own the entire property (Tr. 332).

The agreement which Hanover refused to sign is in evidence (Exhibit G, Tr. 456, erroneously referring to as Ex. K by appellants' counsel, Tr. 328, 331). Referring to this exhibit the trial court in its

final opinion said, with respect to Hanover, "he could have settled this dispute by a stroke of the pen" (Tr. 149). This is correct, and it emphasizes the reason why we introduced the exhibit. It gave to Charlotte the utmost which by a favorable construction of the will she was entitled to receive (and which she thereafter received until her death, without an agreement (Tr. 90-2)). And Hanover did not sign it because he felt it gave Matthew and him nothing. The proposed release by Charlotte of any interest in the property, beyond the right to income for life, was but releasing to the grandsons that which they had been repeatedly assured was already theirs (Tr. 333-4).

Indeed, on June 30, 1933, Robert H. Strong, named by Henderson as his executor, had filed a petition in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, for the probate of Henderson's will. The executor's attorney in the probate proceedings was Robert F. Maguire, the appellee Howell's attorney in this case. In this petition Strong represented that Henderson died leaving an estate in Multnomah County "consisting of Lots 16 to 21, both inclusive, in Block 3, Mountain View Park No. 2, Multnomah County, Oregon, of the approximate value of \$100.00 and with an annual rental value of not exceeding \$5.00, and the right of appointment and bequest to his then wife, Charlotte Howell Deady, of the income from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term

of the natural life of the said Charlotte Howell Deady." Henderson had executed his will October 22, 1932 (Ex. 1, Tr. 199). In that will he expressly referred to the power of appointment given him under the Eighth paragraph of his mother's Will, and exercised it in favor of his wife, Charlotte (Tr. 199-200). Almost two years after filing the petition for probate of that will, the Executor, Robert H. Strong, filed the inventory and appraisement (Ex. B, Tr. 214), in which he swore that the only assets of the estate consisted of the above described lots in Mountain View Park with a value of \$100.00 (Tr. 217). The trial court held both the petition and the inventory and appraisement to be inadmissible in evidence (Tr. 121). However, under the Oregon statute an executor is entitled to possession of the real property of the deceased "and to receive the rents and profits thereof" during the course of administration (O.C.L.A., Section 19-301). It is his duty to report assets for State Inheritance Tax purposes (O.C.L.A., Sec. 20-146) and to file returns and make payment of the Federal Estate Tax (26 U.S.C.A., Secs. 821-2). Under the authorities to which we have already referred, Robert H. Strong, as executor, was accordingly interested in a construction of the Will and his construction thereof is persuasive evidence of its meaning.

Likewise, when upon Henderson's death, the question of an additional inheritance tax arose, all parties acted on the assumption that the only mat-

ter involved was the power of appointment. All negotiations with respect to the additional inheritance tax was on the basis that this tax was due from the estate of Lucy A. H. Deady, and it was so paid (Tr. 429-442), which, of course, that estate did not owe if, as appellee contends, Charlotte was entitled to the income as a devisee of Henderson's estate rather than as an appointee of the power of appointment created by Mrs. Deady's will.

The will of Charlotte (Tr. 201) also indicates very clearly that she did not believe, when she executed her will in May, 1933, that her husband then had a two-thirds interest in this valuable property which some day would be inherited by her. In her will she provides that in the event her husband predeceases her she gives all her property to her son, Richard Howell Busck, also known as Richard Howell, the present appellee. She says: "I make no provision for my daughter, Karen Busck, in this, my last Will and Testament, because she has arrived at her majority and has received her education and is self-supporting" (Tr. 202). We do not believe that in giving that reason for giving nothing to her daughter she believed she was disinheriting her daughter of an interest in an estate consisting not only of the 60-acre farm in Connecticut mentioned in her Will, but also of a two-thirds interest in real property in Portland, Oregon, valued at \$300,000.

OPINIONS OF TRIAL COURT

The trial court rendered three opinions, one on the Motion to Dismiss the Amended Bill of Complaint (Tr. 34-63), one on the admissibility of evidence (Tr. 112-130), and a final opinion discussing the effect of the evidence offered at the trial (Tr. 130-52). Due to limitations of space, the comments we have already made will have to suffice regarding the last two of these opinions, and also with regard to the greater portion of the opinion on the Motion to Dismiss the Amended Bill of Complaint. However, we wish here briefly to analyze the process of reasoning by which the learned trial court arrived at the conclusion, embodied in the decree (Tr. 179), that the only effect of the Seventh paragraph of the Will was to substitute Matthew and Hanover for Henderson in the event that Henderson died without issue *prior* to the death of Mrs. Deady—that if he outlived her he obtained an absolute indefeasible fee.

The court in its opinion, as we have already pointed out, rejects the possibility that the words “die without issue” would be construed in Oregon to import “indefinite failure of issue” (Tr. 45-6, 61-2). With this conclusion we, of course, agree.

The trial court then explored the possibilities to determine which of three possible intentions was expressed in the Will (Tr. 45)—whether the gift over was to take effect in the event of (1) “death at any time”, or (2) death at some “intermediate

date", or (3), as a "substitutional gift", death prior to Testatrix's death. Citing *Britton vs. Thornton, supra*, 112 U.S. 526, 533, and other cases, the court notes (Tr. 47) that "in many jurisdictions" the Seventh paragraph of the Will would be construed to mean that Henderson's title would pass on his death "whenever that occurred" to the grandsons "if no other intention were expressed as to this by the will". This, of course, is the construction which we urge, and we again call attention to the fact that *Britton vs. Thornton, supra*, has been twice quoted with approval by the Supreme Court of Oregon and cited with approval in one other case. The trial court, however, also states (Tr. 53) that a principle "widely accepted" is that an "intermediate date" should be selected unless the will indicates a contrary intention. The trial court says (Tr. 53) "all in all, the wishes of most testators are best interpreted by choosing an 'intermediate date' "—again citing, and quoting, *Britton vs. Thornton, supra*, which we respectfully submit stands for no such principle. Certainly that case cannot stand for both of the above propositions, for they are mutually inconsistent.

Having thus concluded that the Testatrix intended by the Seventh paragraph that the limitation over to Matthew and Hanover was to occur not on the death of Henderson "at any time", but at his death prior to an "intermediate date", the court endeavors to find such intermediate date. The court says (Tr. 55) :

“Unless, therefore, a clearly valid ‘intermediate date’, consistent with these limitations can be found, no devise over should be given effect, but the primary grant should be absolute.”

The court discusses at some length the twenty-five year restraint on alienation, contained in the Sixth paragraph of the will, and concludes that this twenty-five year period is the “outstanding feature of the will” (Tr. 52) and the “salient factor of the will” (Tr. 59). The opinion reasons that “the express condition against alienation and the limitation over on death without issue are mutually interdependent” (Tr. 56). It then states that if Henderson had outlived the twenty-five year period, “he would have taken the fee title, as above noted” (Tr. 56). But since the court holds that the twenty-five year restraint on alienation is void, the court reasons that the “executory devise dependent either upon his death without issue during the time when this condition fettered enjoyment, or after the expiration of the unreasonable period of twenty-five years would be void” (Tr. 57). Therefore the court “arrives at the conclusion that no valid ‘intermediate date’ can be chosen which will give validity to the executory devise” (Tr. 59-60). And from this the court concludes that the intention of the Testatrix must have been a substitutional intent, and that since Henderson outlived the Testatrix he took an absolute indefeasible fee simple title (Tr. 60-3).

Briefly our answer to the court’s reasoning is as follows:

First: In Oregon, as elsewhere, a will should be construed if possible so as to give it a legal, and not an invalid, result. *Closset vs. Burtchaell*, 112 Or. 585, 602, 230 Pac. 554, 560.

Second: We respectfully disagree with the statement of the learned trial court (Tr. 53) that there is "widely accepted" any principle that the courts will construe a will if possible so as to make the limitation over dependent upon the death of the first taker at some "intermediate date". On the contrary, we state that no such rule exists, certainly not in Oregon. The case of *Britton vs. Thornton*, *supra*, cited by the court (Tr. 47, 53), does not, as we have pointed out, support such a proposition. The trial court's opinion says that this principle is a corollary of a rule "of many jurisdictions" that where the executory devise "upon the death of the first taker without children is postponed by an estate for life or for years . . . the executory devise is dependent upon this date". (Tr. 52-3). But in *Bilyeu vs. Crouch*, *supra* (96 Or. 66, 189 P. 222), already discussed above, where the "first taker's" estate was postponed by a life estate, the court held that the limitation over was *not* dependent in time upon the death of the life tenant. Although the "first taker", Frank Ingram, outlived the life tenant, the court held that his death thereafter without issue terminated his estate and gave effect to the executory devise over. And in other cases also the Oregon court has disregarded the "intermediate date" theory stressed by the trial court. It disregarded

it in *Love vs. Walker, supra* (59 Or. 95, 115 P. 296), where as here there was an alleged "intermediate date" of distribution to the beneficiaries, Judge Burnett alone dissenting on this point. And in *Imbric vs. Hartrampf, supra* (100 Or. 589, 198 P. 521), in holding that the first taker obtained an indefeasible fee it did so without reference to an "intermediate date" which was suggested in a specially concurring opinion by Judge Burnett. It should be noted that Judge Burnett delivered the opinion of the court in *Bilyeu vs. Crouch, supra*.

Third: But even though it should be assumed, as the trial court concluded, that the devise over to Matthew and Hanover upon the death of Henderson without issue was controlled by the twenty-five year period, it certainly does not follow that the limitation over is void. Whether that event, the death of Henderson, must occur, within the meaning of the Will, within a period of twenty-five years, or whether it is sufficient that it occur "at any time", it is nevertheless *the death of Henderson* ("a life in being") which gives effect to the executory devise. If Henderson had survived twenty-four years after the death of his mother, his death would obviously have been within a life in being. Conversely, if he had died immediately after his mother's death, the executory devise to the grandchildren would then immediately have vested. In this latter case it may be that the grandchildren would not have been entitled to possession of the real property until the end of the twenty-five years, or even

later. But as recognized in the trial court's opinion (Tr. 57), the rule against perpetuities is concerned not with the enjoyment, or possession, of estates, but with the *vesting* thereof. See *Closset vs. Burtchaell, supra* (112 Or. 585, 606-9, 230 P. 554, 561-2). Under no possible construction of the Will, even adopting the trial court's "intermediate date" theory, could the two-thirds interest vest in the grandsons at a period later than that provided in the rule against perpetuities—a life or lives in being plus twenty-one years. See *O'Hare vs. Johnston*, 273 Ill. 458, 113 N.W. 127; *In re Rousseau's Estate*, 48 S.D. 501, 205 N.W. 222; *Swain vs. Bowers*, 158 N.E. 598 (Ind. App.); and *Closset vs. Burtchaell, supra*. Accordingly, even though we adopt the construction reached by the trial court that the devise over to Matthew and Hanover was dependent upon the death of Henderson within twenty-five years, the devise over is not void, but is valid.

It should be particularly noted that the learned trial judge accepted the "substitutional gift" doctrine only as a last resort. He adopted it only because he failed to find, from the language of the will, a valid "intermediate date". In this respect we respectfully submit that the learned trial judge committed grievous error. He erred in holding that, on a proper construction of the will, the executory devise was dependent not on Henderson's death "at any time", but on his death prior to the "intermediate date" of twenty-five years; but having so found, he further erred in holding that an executory devise

dependent upon Henderson's death within a period of twenty-five years was void. And only because he so held did he adopt the "substitutional gift" doctrine.

ABSENCE OF NECESSARY PARTIES

The Fifth defense (Tr. 68) of the Answer alleges that the estate of Henderson Deady, through whom the plaintiff-respondent claims, has not been closed, and raises the point that there is an absence of an indispensable party, the executor of Henderson's estate, without whom the case could not be tried. The District Court did not consider Henderson's executor a necessary party (Conclusions of Law 8, Tr. 176).

Under Oregon statutes (O.C.L.A., Secs. 19-301 and 19-1202) an executor is entitled to the possession and control of real property and to the rents and profits thereof, to the exclusion of heirs and devisees. The Oregon Supreme Court has held that the administrator and not the heirs is the proper party to sue for injury to the real estate. *Boyer vs. Anduiza*, 90 Or. 163, 165; 175 P. 853. And this court has held that a devisee, in Oregon, cannot bring ejectment while the estate is in the process of administration. *Bilger vs. Numan*, 199 Fed. 549, 561 (9th Circ.).

It would seem clear that the issues raised by and the demands of the appellee in this suit cannot be litigated without the presence of the executor of

Henderson's estate, and that this suit should be dismissed because of the absence of that indispensable party.

There is nothing in the record to indicate that Henderson's executor was requested to bring or join in this suit, but, if such were the case and he refused to comply, he would nevertheless be an indispensable party whom the appellee should have been compelled to bring in.

CONCLUSION

As we said at the outset, to us this case seems simple. It becomes complex only when something is read into the will which is not there, when an intention is imputed to Mrs. Deady which everybody knows she did not have.

She wanted this property to remain in the family "as a monument to Judge Deady". When her last surviving son—for whom she provided so generously during his lifetime—should die, she wished her only grandchildren to have the property.

To her three sons' widows she desired to provide a monthly income during their lifetime, but no more. That this was the full extent of her gifts to the widows of Paul and Edward is, of course, manifest; and no one can assert that her feelings toward Charlotte were more kindly than toward Mary and Marye. In fact, Charlotte was not yet the wife of

Henderson either when the will was executed or when Mrs. Deady died, and Mrs. Deady's attitude toward her was, to put it mildly, one of disapproval (Tr. 269). And yet appellee contends that although Mrs. Deady desired the widows of Edward and Paul to receive but a small fraction of the income for life (\$150.00 per month and \$75.00 per month, respectively), it was her intention that immediately upon Charlotte becoming Henderson's widow she should become vested with an absolute fee simple title to two-thirds of the entire property.

The will clearly intended no such result. Not until both Henderson and Charlotte had passed on did anybody interested in its provisions assert that it did. On the contrary, they all construed it to mean what Mrs. Deady intended it to mean—that upon Henderson's death without issue title to the entire property should “vest in my grandsons”, Matthew and Hanover. Henderson's repeated assertions that by reason thereof Matthew and Hanover would eventually be sole owners of the property were accepted by them as reason enough for them to consent to payments to Henderson even in excess of the liberal provisions for him in the will.

This desire of the testatrix, so clearly (we submit) expressed in her will and accepted by Henderson during his lifetime, and in his own will, and by his executor ever since, cannot now, justly or lawfully, be frustrated. Certainly not in a state like Oregon, whose Supreme Court has so often insisted

that the sole function of the court in this type of case is to ascertain "the true intent and meaning of the testator", and, if lawful, to enforce it.

Respectfully submitted,

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APPENDIX A

Last Will and Testament of Lucy A. H. Deady, deceased (Tr. 4-9).

“IN THE NAME OF GOD, AMEN: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

“First: I will and direct that all my just debts and funeral expenses be paid.

“Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

“Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

“Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

“Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, wife of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Mary Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

“I further direct that the remainder of the income derived from real property, shall be distributed as follows:

“(a) To the payment to each of my grandsons, Matthew Edward Deady and Hanover Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

“Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my executors for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

“Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devisees to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

“Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block

numbered 212, shall rest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

“Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady.

“Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

“Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

“Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

"Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatsoever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two-thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

"Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees herein named, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

"I hereby revoke all former Wills by me at any time made.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 29th., day of July, A. D. 1920, at Portland, Oregon.

Lucy A. H. Deady (Seal)

"The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

Chester V. Dolph, Residing at Portland, Or.
J. V. Beach, Residing at Portland, Or."

APPENDIX B

Quotations from Cases Cited on Page 20 of the Brief on the Subject of "Cutting Down the Fee".

In *In re Briggs' Estate*, 186 Cal. 351; 199 P. 322, 324, the California Supreme Court said:

"In support of his contention that the second clause is repugnant to the first, in that it is contradictory and inconsistent, respondent argues that the testatrix by the first clause created an absolute estate; that the second clause in cutting down the estate becomes repugnant to the first clause which creates it absolutely. We think the effect of the second clause is not to cut down an absolute estate which may have been created by the first, but merely expresses one phrase of her testamentary intention. Neither clause is complete within itself, but together they create a limited fee."

In *In re Barrett's Estate*, 85 Neb. 337; 123 N.W. 299, 301-302, the Supreme Court of Nebraska (which state has a statute like Oregon's O.C.L.A., Sec. 18-603) said:

"* * * nor, considering the entire instrument, does it seem reasonable to hold that the testator intended to vest in indefeasible estate in fee simple in his son. It is argued that to hold that the will creates a valid executory devise is to say that the son received a mere life estate, and that, if such an estate were intended the testator would have used words to express that intention. The vice of this argument is that the devise over does not cut down the first taker's estate to one for life. John M. Barrett's title was a base or determinable fee, which is defined

by Kent as 'an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent.'

* * * We are satisfied that, when all of the provisions of the will are read together, there is no repugnancy between them * * *."

The Oregon Supreme Court said in *Rowland vs. Warren*, 10 Or. 129, 131 :

"The devise in the first clause of the will, therefore, gave Mary E. Hembree either a fee simple absolute or a fee simple conditional. It remains to be seen what qualification has been annexed to the estate by the last clause in the will."

APPENDIX C

Quotations from *Stubbs vs. Abel*, 114 Or. 610; 233 P. 852, cited on page 21 of the brief, on the point of defeasible fee.

114 Or., p. 624-6; 233 P., p. 857:

"The will of Richard Williams, so far as is material to this opinion, reads:

* * * * *

'Sixth: All the rest, residue, and remainder of my property, real and personal, of every description, I give, devise and bequeath, to my daughter, Edith W. Stubbs, one-half thereof, and to Richard C. Williams and Claire S. Williams one-half thereof, subject, however, to such disposition as I may hereinafter make of any portion thereof.'

* * * * *

"The next provision constitutes the pivotal point of the case, and the meaning expressed therein is decisive of this cause. It reads:

'Should any one of my grandsons die before receiving the legacy herein provided for him, such portion as he would otherwise have received shall go to his surviving brother. Should both brothers die before arriving at the age to receive the legacy or legacies provided for them, then such legacy or legacies that would otherwise have gone to them shall become a part of the residuary legacy herein provided in the sixth paragraph of this will.' "

114 Or., p. 633; 233 P., p. 859-60:

"To sustain the position of the appellants, the court would be compelled to mutilate the testator's statement of his expressed intent and give

effect to one clause, or part thereof, and deny all effect to the testator's expressed qualification or condition attached to such devise. While the testator could not have made two repugnant, valid, devises, it was within his power to devise a conditional, defeasible or determinable fee, * * *. In plain language, he gives his two grandsons notice that their title to the property bequeathed and devised by paragraph 6 of the will is subject to any lawful 'disposition' that the testator might 'hereinafter make.' The testator then proceeded to make a disposition of that property that plainly shows that Claire S. Williams never possessed more than a qualified or defeasible fee in the real property involved herein."

APPENDIX D

Quotations from cases, cited on page 26 of the brief, on the point that even in jurisdictions holding that the phrase "die without issue", standing alone, indicates death prior to testator's death, the courts hold that the *slightest indications* in the will overcome this presumption and show that the intention is death at any time.

In *In re Barrett's Estate*, 85 Neb. 337; 123 N.W. 299, the court said:

"The rule that the words of limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise."

In *Vanderzee vs. Slingerland*, 103 N.Y. 47; 8 N.E. 247, the court said:

"But the rule established by the courts applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, or other specified event. Indeed, *the tendency is to lay hold of slight circumstances in the will to vary the construction, and to give effect to the language according to its natural import*". (Italics added.)

In *In re Haydon's Estate*, 334 Pa. 403, 6 A. (2d) 581, the court said at page 583 of the Atlantic Reports:

“Where an absolute estate is devised followed by a gift over in the event of the death of the donee without issue, the rule of construction that is applied in the absence of a contrary intention is that the gift over will be construed as referring to death without issue in the lifetime of the testator. *Mickley’s Appeal*, 92 Pa. 514; *In re Lerch’s Estate*, 309 Pa. 23, 159 A. 868. But where the will indicates that the testator contemplated that the death of the legatee without issue might occur after his own death this rule of construction does not apply. As we said in *Re Mebus’ Estate*, 273 Pa. 505, 516, 117 A. 340, 343: ‘The rule is never applied where the first takers referred to are treated as living at a period subsequent to the death of the testator’. In the instant case the provisions that the Trustee should pay the interest from the two funds to the daughters during their lives indicates conclusively that the testator regarded them as surviving him, for it is obvious that the duty to make the payments could not rise until after the testator’s death.

“Hence it is apparent that the testator did contemplate that the event of dying without issue might occur after his own death.”

APPENDIX E

Quotations from Oregon Statutes, Cases, and A.L.R. Annotations, Cited on Page 52 of the Brief, Respecting the Admissibility of Declarations and Conduct of Lucy A. H. Deady, the Testatrix.

O.C.L.A., Sec. 2-218, provides as follows:

“Consideration of circumstances. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.”

O.C.L.A., Sec. 2-214, provides as follows:

“Evidence of terms of agreement reduced to writing. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

- (1) Where a mistake or imperfection of the writing is put in issue by the pleadings;
- (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 2-218, *or to explain an ambiguity, intrinsic or extrinsic*, or to establish illegality or fraud. The term ‘Agreement’ includes deeds and wills as well as

contracts between parties.” (Italics added.)

The above statute is copied from California Code Civ. Proc., Sec. 1856, except that in the California statute the above-italicized portion of the Oregon statute reads: “or to explain an *extrinsic* ambiguity”.

In *Crown Company vs. Cohn*, 88 Or. 642, 655; 172 P. 804, 808, the Oregon Supreme Court said:

“In construing the terms of a trust deed, the purpose of a court should be to ascertain the trustor’s intention which design is to be determined from an inspection of the entire language of the conveyance. If the words thus employed are plain and unambiguous there is no necessity for judicial interpretation.

‘But where the instrument is indefinite or inconsistent, the court can look at the declarations of the donor and consider the surrounding circumstances in determining just what the intention of the donor was’: 39 Cyc. 197.”

Again in the same case (88 Or. at p. 656; 172 P. at p. 809):

“Construing together the clauses referred to a latent ambiguity is manifest, as to the means to be adopted to accomplish the purpose clearly intended. In view of such uncertainty the testimony of the several defendants, and that of the attorney who at Mrs. Friendly’s request prepared the trust deed, was properly received, showing that the provisions of the first clause of the conveyance were intended by the trustor to be incorporated in, and read in connection with all the other clauses when necessary to a proper execution of the power conferred.”

Calder vs. Bryant, 282 Mass. 231; 184 N.E. 440;
94 A.L.R. 18, at pp. 22-3:

“Extrinsic evidence of the conduct and the declarations of the testator is competent. They are not to be deemed direct proof of testamentary intention, but as showing the testator’s relation to, and state of feeling towards, any of the respective claimants.”

Annotation: “Admissibility of Extrinsic Evidence to Aid Interpretation of Will”, 94 A.L.R. 26:

p. 263:

“Although the authorities do not warrant any such broad or unqualified statement of the rule, it has been frequently laid down as a general rule that evidence of declarations by the testator is not admissible to aid in the construction of a will.”

p. 272:

“It is well settled that extrinsic evidence generally is not admissible to control the construction of an unambiguous will, or to vary, contradict, or add to the terms of a will. These principles apply a fortiori where the evidence offered consists of the testator’s declarations of intention.”

pp. 280-281:

“Where the declarations are offered not to show direct expressions of intention by the testator, but to show the facts and circumstances surrounding him, and the situation under which he executed the will, such declarations are admissible to aid in the construction of an ambiguous provision.

“Even in a case where direct declarations of intention are not admissible, ‘declarations by a testator on a point collateral to the question of intention may be evidence of an independent fact material to the right interpretation of the testator’s words’ *Re Glassington* (1906) 2 Ch. (Eng.) 305. See also *Re Ofner* (1908) W. N. (Eng.) 208—C.A.; *Re Ofner* (1909) 78 L.J. Ch. N.S. (Eng.) 50—C.A., *infra*, IV, s. 7.

“Thus, in *Re Lummis* (1917) 101 Misc. 258, 166 N.Y. S. 936, the court stated: ‘The declarations of the testator which have been testified to, showing that the testator appreciated the extravagance of his family, were not offered as declarations of testamentary intention, but for the purpose of showing one of the surrounding circumstances attending the execution of the will. Such declarations of a testator are not received as his expressions of his intention either to charge or not to charge legacies upon the land. They are received in order to show testator’s knowledge and appreciation of the extent of his property. This is deemed a proper circumstance to be considered on the question now before the court.’

“And in *Gould v. Chamberlain* (1903) 184 Mass. 115, 68 N.E. 39, the court stated: ‘A testator’s declarations of his intentions are inadmissible, though logically they would seem to be the best evidence obtainable. They are excluded, however, by reason of the statute which requires wills to be in writing, and also of the rule that forbids the introduction of parol evidence to alter or vary written instruments. In the present case the evidence that was admitted was not evidence of statements by the testator of his intentions, but was evidence tending to show a knowledge and appreciation on his part of his situation and circumstances, and as such was clearly admissible.’

“And in *Sussex Trust Co. v. Polite* (1919) 12 Del. Ch. 64, 106 A. 54, the court stated: ‘Declarations, whenever made by a testator, as to his intentions in using certain words in the will, or as to a proper construction to be made of them, are inadmissible in evidence. * * * But evidence is always admissible as to the state of the testator’s property, and his purpose in acquiring it, as distinct from evidence of his declarations as to the meaning of the words of his will. * * * Such purpose may be shown by declarations or acts, and in this case we have both, and evidence of both is admissible for the same purpose.’

“So, also, in *Morse v. Stearns* (1881) 131 Mass. 389, admitting declarations of the testator where the inaccurate description was partly applicable to two claimants, the court stated: ‘Extrinsic evidence of the conduct and the declarations of the testator is competent. They are not to be deemed direct proof of testamentary intention, but as showing the testator’s relation to, and state of feelings towards, any of the respective claimants.’

“And the court in *Calder v. Bryant* (Mass.) (reported herewith) ante, 19, apparently recognized that declarations of a testator, incidentally throwing light on the terms used in his will, would be admissible as a part of the circumstances surrounding him and as showing his relations with the claimants.”

APPENDIX F

Quotations from Oregon Statutes, Cases and A.L.R. Annotations on Admissibility and Effect of Evidence of the Construction of a Will by Interested Parties, cited in Brief, p. 55.

O.C.L.A. Sec. 2-206:

“Declaration, act or omission of grantor as evidence. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.”

For a construction of the above statute, see *Sperry vs. Wesco*, 26 Or. 483, at p. 491; 38 P. 623, at p. 625.

O.C.L.A. Sec. 2-210:

“Declaration, act or omission of decedent against interest. The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.”

O.C.L.A. Sec. 2-228:

“Facts which may be proved. In conformity with the preceding provisions evidence may be given on the trial, of the following facts:

- * * * * * * *
- (4) * * * the declaration or act of a deceased person, made or done against his interest in respect to his real property; * * *”.

In *Stubbs vs. Abel*, 114 Or. 610, 624; 233 P. 852, 857, the Court said:

"We have referred to the matter of the above petition and the probate proceedings for the purpose of showing the practical construction that was placed upon the will by the parties interested therein. No attempt was made by the heirs to dismember the will by interpreting it to mean what the defendants now assert it means. The devisee, Claire S. Williams, treated his devise as contingent upon his living to the age of thirty years, and such was the construction placed upon the will by the other beneficiaries.

'Although the interpretation placed upon a will by the parties in interest is a circumstance in favor of a similar construction by the court, yet their interpretation is not entitled to control the court.' 30 Am. & Eng. Ency. of Law (2d ed.), 673."

In *Moore vs. Moore*, 121 Or. 48, 56; 252 P. 964, 967, the Court said:

"While the construction given the will by the interested parties is not controlling, it is persuasive on the court where it is just and equitable and has been acquiesced in for many years: 40 Cyc. 1427. In the instant proceeding we think the court is warranted in adopting the construction of the interested parties that the mother and her children were tenants in common of this property."

Annotation: "Practical Construction Placed On Will By Parties Interested", 67 A.L.R. 1272:

p. 1273:

"Where parties interested have acted upon a not unreasonable construction of an ambiguous will, such fact may be considered by the court in deciding as to the true construction."

p. 1277:

“Where a particular construction of an ambiguous will has been adhered to by interested parties for a long period of time, there is a strong tendency of the courts, apart from evidential considerations, to give effect to such construction, at least as against the persons joining therein; and, of course, where the elements of waiver or estoppel clearly appear, there can be no doubt as to the result.

“Thus, in *Bacon v. Sayre*, (191') 84 Misc. 462, 147 N.Y. Supp. 522 (affirmed in (1914) 164 App. Div. 909, 148 N.Y. Supp. 1105), where a testatrix, after giving equal shares of her estate to her children, absolutely, added the clause, ‘in case any of my said children die without leaving issue surviving them, such deceased one’s share shall go to his or her surviving brothers and sisters,’ it was held, as to the question whether the defeasance by death of a child without issue referred to such death in the lifetime of the testatrix, or later, that the former construction was confirmed by the interested parties’ receiving payments of money thereunder, each acquiescing in the payments to the others, and some of them later making their own wills on the assumption of absolute ownership, the court saying: ‘The practical interpretation which seems to have been placed upon the mother’s will by this family, and particularly by the plaintiff, for nearly thirty years, should not now be disturbed by the court, unless there are most imperative reasons for such action.’

“And likewise in *Wrights vs. Oldham* (1837) 8 Leigh (Va.) 306, where the question was whether a will provided for the distribution of lands and slaves per stirpes or per capita, it was held that the redistribution per stirpes upon two occasions of parts of such property (following the

death of mere life beneficiaries), without objection by the plaintiff or others, was conclusive of the rights involved.

"And in Follmer's Appeal (1860) 37 Pa. 121, where a legatee, after twenty-five years of acquiescence in the distribution of an estate upon the plan that advances made in the testator's lifetime were to be deducted from the legacies in question, claimed a \$10,000 balance to be due him from the executors, it was held that since 'at several successive family meetings payments were made to the several legatees in the presence of each other,' without objection then or afterwards to the plan of distribution adopted, a different construction could not, after such lapse of time, be allowed as a basis for recovery.

"And in Jessup vs. Witherbee Real Estate & Improv. Co. (1909) 63 Misc. 649, 117 N.Y. Supp. 276, where a testator's widow and children, for whom the will created a trust, had, after many years, upon the assumption of absolute title, sold the realty in question and divided the proceeds, it was held that one of such 'children' after acquiescing in such result for thirty-eight years, could not successfully challenge the title so conveyed upon the ground that, at the date of conveyance, the title was in the trustee; the court declaring a rule much broader than the case, that the court will, 'where the language of a will is ambiguous, * * * give effect to the construction placed upon it by all the interested parties.'

Annotation: "Admissibility of Extrinsic Evidence to Aid Interpretation of Will", 94 A.L.R. 26:

p. 245:

"A practical construction placed on an ambiguous provision of a will by the interested parties

is admissible in evidence to aid the court in the construction of the will."

In *Re Estate of Daniel Kelly*, 177 Minn. 311; 225 N.W. 156; 67 A.L.R. 1268, at pp. 1271-2, the Supreme Court of Minnesota said:

"Respondents urge practical construction as an additional ground for sustaining the trial court. Practical construction of a will by the parties interested therein has not been extensively treated in reports and texts. It is, however, well recognized and has been applied in several cases. "In *Dorrance v. Dorrance*, 151 C.C.A. 460, 238 Fed. 524, Ann. Cas. 1918B, 520, the court held that the fact that certain provisions of a will had been accepted as valid for almost 25 years, while not controlling, called upon the court to be cautious in considering a different contention.

"2 Schouler on Wills, 6th Ed. § 841, states: 'The practical interpretation placed on a will by all parties interested for a long period of time, will not be disturbed, except for most imperative reasons.'

"In *Guilford v. Gardner*, 180 Iowa 1210, 162 N.W. 261, the court said: 'If the construction of the devise were one open to any reasonable doubt, the fact that the son, the one person adversely affected by the condition attached thereto, survived the testator more than two years, and never in his lifetime, so far as the record shows, questioned the conditional character of his title, it is significant of the meaning and effect of the testator's language, as it appeals to the ordinary mind.'

"In *Runyon v. Pond Creek Coal Co.*, 197 Ky. 757, 248 S.W. 188, the court said: 'In addition, as we have seen, plaintiff himself, by his conduct in moving away in 1896 and making no

claim to any character of interest in the land in controversy for more than fifteen years construed the will as making the top of the ridge the dividing line.'

"Other cases are *Coulter v. Crawfordsville Trust Co.*, 45 Ind. App. 64, 88 N.E. 865; *Jessup v. Witherbee Real Estate & Improv. Co.*, 63 Misc. 649, 117 N.Y. Supp. 276; *Bacon v. Sayre*, 84 Misc. 462, 147 N.Y. Supp. 522."

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,

vs. Appellants,

RICHARD HOWELL, Appellee.

RICHARD HOWELL, Cross-Appellant,

vs.

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,

Cross-Appellees.

**Appellee's Answering Brief and Cross-
Appellant's Opening Brief**

Upon Appeals from the District Court of the United States
for the District of Oregon.

HON. JAMES ALGER FEE, District Judge

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,

vs. Appellants,

RICHARD HOWELL, Appellee.

RICHARD HOWELL, Cross-Appellant.
vs.

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,
Cross-Appellees.

Appellee's Answering Brief

Upon Appeals from the District Court of the United States
for the District of Oregon.

HON. JAMES ALGER FEE, District Judge

JURISDICTION OF THE COURT

The jurisdiction of the District Court in this case is based upon diversity of citizenship (28 U.S.C.A., Sec. 41-1), it appearing from the Pre-Trial Order that the plaintiff is a citizen of Connecticut (Tr. 72-3), the defendants are citizens of Oregon (Tr. 73) and the matter in controversy involves real

property and the income therefrom which exceeds in value the sum of \$3,000 (Tr. 73).

The jurisdiction of the Circuit Court of Appeals to review the decree of the District Court (Tr. 178) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

STATEMENT OF THE CASE

This is a suit for declaratory and equitable relief, seeking a construction of the will of Lucy A. H. Deady, who died in Multnomah County, Oregon, on August 29, 1923. The particular property involved is a business site in downtown Portland, known as Lot One (1), Block Two Hundred Twelve (212), which is now held and managed by the defendant bank, purporting to act as a trustee under the will.

The plaintiff claims to be the owner in fee simple of an undivided two-thirds interest in the property, subject to certain charges, and asserts that he is being wrongfully deprived of the possession and income therefrom, asking, among other things, for an accounting of the rents and profits. The trial court decided in plaintiff's favor as to his interest under the will, and decreed an accounting, but held that by reason of a stipulation dated October 28, 1925, he is not entitled to any of the income from the property until the death of Marye Thompson Deady.

Defendants have appealed from the entire decree, and plaintiff has cross-appealed from that portion of the decree which denies him any right to the present income. Pursuant to stipulation approved by this court, plaintiff combines herewith his answering brief as appellee and his opening brief as cross-appellant. For simplicity, the designations in the lower court as "plaintiff" and "defendants" are used herein.

Plaintiff derives his claim to the property through his deceased mother, Charlotte Howell Deady, who was the wife of Henderson Brooke Deady. Henderson was a son of Lucy A. H. Deady, the testatrix whose will is in question. Plaintiff contends that by the will of Lucy, Henderson took a fee simple interest in two-thirds of the property, which he devised to his widow, Charlotte, who in turn devised to the plaintiff. The defendants contend that Henderson took only a defeasible fee which terminated on his death, and that his interest then passed to defendants, Matthew and Hanover, nephews of Henderson and grandsons of Lucy. For the convenience of the court a chart of the family is printed herewith:

LUCY A. H. DEADY

(died Aug. 29, 1923)

had three sons

Edward N. Deady

(died before Lucy)

widow, Mary E.

Deady

(still living)

had two sons

Henderson Brooke Deady

(died May 28, 1933)

1st wife, Amalie B. Deady

(divorced in 1925)

had no children

2nd wife, Charlotte

Howell Deady

(died July 12, 1935)

had no children by

Henderson, but one son by

a former marriage

Paul R. Deady

(died before Lucy)

widow, Marye Thompson

Deady

(still living)

had no children

Matthew Edward Deady

(still living—

defendant here)

Hanover Deady

(still living—

defendant here)

Richard Howell

(still living—

plaintiff here)

The principal dispute revolves about the construction of Paragraphs 3 and 7 of Lucy's will. The entire will is set out in the transcript (pages 34, et seq.) and is considered in detail at a later point herein, but those paragraphs are here repeated:

"Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon."

"Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons."

In this respect, the plaintiff contends that the failure of issue mentioned in Paragraph 7 refers to the event of Henderson's death without issue prior to the death of the testatrix, and that since he survived the testatrix his fee simple interest became absolute and indefeasible. The defendants on the other hand, contend that the clause must be taken to refer to the death of Henderson at any time without issue, and that since he did not have children at the time of his death, his interest was defeated and passed to Matthew and Hanover.

Plaintiff likewise contends that Paragraphs 5 and 6 of the will are invalid, as contravening settled rules of law. Paragraph 5 provides for the accumulation of a certain portion of the income from the property for an indefinite period in a sinking fund for the purpose of retiring the mortgage debt against the property; and Paragraph 6 imposes a restraint on the alienation or incumbrance of the property for the absolute period of 25 years. Plaintiff likewise contends that no valid trust was created by the will, and hence the possession of the bank as purported trustee under the will is utterly wrongful. With respect to the stipulation of October 28, 1925, on the basis of which the trial court denied to the plaintiff any right to the present income during the life of Marye, plaintiff contends that there is nothing in that stipulation to prevent the residue of the income, after the payment of the charges, from following the ownership of the property.

Defendants have urged (Br. p. 7) that the invalidity of Paragraphs 5 and 6 is immaterial unless the plaintiff first establishes that he has an interest in the property. This argument completely begs the question, however, for the fact of the invalidity is itself of considerable weight in determining the proper construction to be given to the will. Plaintiff contends that because the principal features of Lucy's plan of disposition cannot be legally carried out, and since those elements are so closely interwoven with the rest, the entire plan as to this property must fail, and under the residuary clause (Par. 12) Henderson would take two-thirds in fee and Matthew and Hanover would each take one-sixth, thus reaching the same result in the end as under the construction of paragraph 7 for which we contend.

Before considering these arguments in detail, we set forth here a summary of the pertinent

PROPOSITIONS OF LAW

I.

In the construction of an Oregon will devising real property located in Oregon, a federal court sitting in Oregon must follow the Oregon law. If the state court has not passed directly on the question, the federal court must attempt to determine what the state law would be if the question were presented, by applying the principles which the state

court would have applied—there being no “federal common law.”

Barber vs. Pittsburgh, 166 U. S. 83, 17 S. Ct. 488.

Clarke vs. Clarke, 178 U. S. 186, 20 S. Ct. 873.

Erie Railway vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817.

II.

In construing a will, it is not simply the intention of the testatrix, but the *expressed* intention, as gathered from the words used, which governs.

Stubbs vs. Abel, 114 Ore. 610, 619; 233 Pac. 852.

Boren vs. Reeves, 73 Ind. App. 604; 123 N. E. 359, 360.

Painter vs. Hirschberger, 340 Mo. 347, 100 S. W. 2d 532.

Consequently, where technical words are used, or words which have a settled legal significance, they will normally be given their technical meaning, especially when the instrument is obviously prepared by a skilled draftsman.

Fowler vs. Duhme, 143 Ind. 248; 42 N. E. 623, 626.

69 C. J. 76, Wills, Sec. 1129.

III.

Even the expressed intent of the testatrix will not be given effect, however, if that intention offends against public policy or some positive rule of law. And where such a rule of law operates to defeat intent, the will must be interpreted in the first instance

as if the rule did not exist, and then to the provision so construed the rule must be "remorselessly applied."

Closset vs. Burtchaell, 112 Ore. 585, 601; 230 Pac. 554.

Matter of Wilcox, 194 N. Y. 288; 87 N. E. 497.
Gray on Perpetuities (3rd Ed.) Sec. 629.

IV.

It is a well recognized rule, in this state embodied in statute, that where an estate in fee is given in one clause of a will, the estate thus granted cannot be taken away or diminished by any "subsequent vague or general expression of doubtful import," but the intent to debase the fee must *clearly appear from the will*.

"A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it *clearly appears from the will* that he intended to devise a less estate or interest;" O. C. L. A., Sec. 18-603 (italics supplied).

"The term 'heirs' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple: and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant." O. C. L. A., Sec. 70-105.

Irvine vs. Irvine, 69 Ore. 187, 190; 136 Pac. 18.

Imbrie vs. Hartrampf, 100 Ore. 589, 595; 198 Pac. 521.

V.

The provision in Paragraph 5 of the will for the accumulation of a portion of the income for an indefinite period in a sinking fund for the payment of the mortgage indebtedness, and likewise the twenty-five-year restriction on alienation or encumbrance in Paragraph 6, are void as violating the rule against perpetuities, the rule against accumulations and the rule against restraints on alienation.

Closset vs. Burtchaell, 112 Ore. 585; 230 Pac. 554.

Friswold vs. U. S. Nat'l Bank, 122 Ore. 246; 257 Pac. 818:

“ ‘Where it is apparent from the words of the will that the dominant purpose of the testator is to devise a fee simple estate, and the subsequent language indicates merely a subordinate intent to strip the estate thus given of one or more of its inherent attributes, the law will hold that this cannot be done; and the fee simple estate passes to the devisee with all of its inherent qualities’.”

41 Am. Jur. 89 et seq., 108 et seq.; Perpetuities, Secs. 44 et seq., 66 et seq.

48 C. J. 989, Perpetuities, Sec. 80.

69 C. J. 661-664, Wills, Secs. 1758-1762.

VI.

Where provisions in a will are so closely interwoven that the invalid features cannot be separated from the valid ones without seriously upsetting the

general testamentary scheme, the entire plan of distribution will be held invalid.

69 C. J. 117, Wills, Sec. 1159.

28 R. C. L., 358-9, Wills, Sec. 360.

Reid vs. Voorhees, 216 Ill. 236; 74 N. E. 804;
3 Ann. Cas. 946.

VII.

At common-law a gift over on death without issue was construed to mean *indefinite failure*—that is, the extinction of the first taker's line of descendants at any time in the future. Under this construction the limitation created a remainder after an estate in fee tail.

Barber vs. Pittsburgh Railway, 166 U. S. 83, 17
Sup. Ct. 488, 41 L. Ed. 925, 935.

11 R. C. L. 481, Executory Interest, Sec. 19,
Note 13

28 R. C. L. 259, Wills, Sec. 231, Note 10.

69 C. J. 308, Wills, Sec. 1331, Note 87.

Warren, *Gifts Over on Death Without Issue*,
39 Yale Law Journal 332.

“An executory devise to take effect only upon an indefinite failure of issue is void under the rule against perpetuities.”

Imbrie vs. Hartrampf, 100 Ore. 589, 599; 198
Pac. 521.

3 L. R. A. (N. S.) 1144.

19 A. J. 581, Estates Sec. 124.

VIII.

The weight of authority, recognized as such by the Oregon Supreme Court, is to the effect that a gift over on death without issue refers to the death of the first taker *within the lifetime of the testator*, unless a different intent appears from the context of the Will.

28 R. C. L., Wills, Sec. 231:

“It is the general rule that where property is devised to one with a provision for a gift over in case of the death of the legatee or devisee without issue, or without having surviving issue, the event referred to is death without issue *during the lifetime of the testator*.”

Love v. Walker, 59 Ore. 95, 107:

“The rule of construction prevailing in most states of the Union is that a devise of a fee, coupled with a condition that if the devisee die without issue the estate is to go to others, means dying without issue in the lifetime of the testator unless a different intention is manifest from the context of the Will.”

Imbrie v. Hartrampf, 100 Ore. 589, 599; 198 Pac. 521.

(Quoting the following with approval from Ann. 25 L. R. A. (N. S.) 1045, 1059-1063):

“It is well settled that where the terms of the will indicate an intention that the primary devisee shall take the fee on the death of the testator, coupled with a devise over in case of

his *death without issue*, the words refer to a *death without issue during the life of the testator*; and where the primary devisee, surviving the testator, takes an absolute estate in fee simple, this rule of construction is adopted in order to avoid repugnancy, and because the law favors the vesting of estates at the earliest possible moment, in the absence of a clear manifestation of the intention of the testator to the contrary: *Tarvell v. Smith*, 125 Iowa, 388 (101 N. W. 118).

“Where a bequest is direct and immediate, and nothing else appears to aid in the interpretation, *the law inclines to construe ‘die without issue’ as meaning the death of the legatee without issue in the testator’s lifetime*: *Birney v. Richardson*, 5 Dana (Ky.) 424. * * *

“So, also, in *Washbon v. Cope*, 144 N. Y. 287 (39 N. E. 388), it is said that the rule is well settled that where a devise or bequest over to third persons is dependent upon *death without issue* or without children, *the death referred to is death in the lifetime of the testator*.” (Italics Supplied)

IX.

The following are representative of the great number of cases which follow the substitutional rule and construe the gift over to take effect only if the first taker dies without issue *during the lifetime of the testator*

Wallace vs. Stone Co., 76 Fed. (2d) 269, 271 (3rd Cir.).

First Nat’l. Bank of Covington vs. DePauw, 86 Fed. 722, 724 (7th Cir.).

- Darrow vs. Florence*, 206 Ala. 675; 91 So. 606, 607.
- Lawlor vs. Holohan*, 70 Conn. 87; 38 A. 903, 904.
- Fowler vs. Duhme*, 143 Ind. 248; 42 N. E. 623, 627.
- Quilliam vs. Union Tr. Co.*, 194 Ind. 521; 142 N. E. 214, 217.
- Blain vs. Dean*, 160 Iowa 708; 142 N. W. 419, 421-422.
- Prewitt vs. Prewitt*, 178 Ky. 346; 198 S. W. 924, 925.
- Lumpkin vs. Lumpkin*, 108 Md. 470, 70 A. 238, 25 L. R. A. (N. S.) 1063.
- Palmer vs. French*, 326 Mo. 710; 32 S. W. (2d) 591.
- Davis vs. Davis*, 107 Neb. 70; 185 N. W. 442.
- Snyder vs. Taylor*, 88 N. J. Eq. 513, 103 A. 396, 398.
- Washbon vs. Cope*, 144 N. Y. 287, 39 N. E. 388, 391.
- In re Sewald's Est.*, 281 Pa. 483, 127 A. 63.
- Steere vs. Phillips*, 61 R. I. 232, 200 A. 970, 972.
- Scruggs vs. Mayberry*, 135 Tenn. 586, 188 S. W. 207, 209-10.
- In re Gulstine's Est.*, 166 Wash. 325; 6 Pac. (2d) 628, 631.
- In re Caldwell's Will*, 205 Wis. 587, 238 N. W. 367, 368.

X.

As a corollary to the substitutional rule, it is held that where a remainder is created after a life estate,

and the remainder is subject to a limitation over in case the remainder-man should die without issue, the remainder-man takes an absolute fee if he survives the life tenant.

Boynton vs. Boynton, 266 Mass. 454; 165 N. E. 489, 491.

Ewart vs. Dalby, 319 Mo. 108; 5 S. W. (2d) 428, 434.

Davis vs. Scharf, 99 N. J. Eq. 88; 133 A. 197.

Flores vs. Degarza, 44 S. W. (2d) 909 (Tex.).

Wolf vs. Van Nostrand, 2 N. Y. 436.

XI.

If Henderson had predeceased the testatrix, without leaving issue, the devise to him would have lapsed, since the Oregon Lapse Statute applies only where the devisee leaves *lineal descendants*. His share would therefore have gone to Matthew and Hanover by way of intestate succession, rather than under the terms of the Will, and it would have been freed from all the restrictions and charges of the Will.

“When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator.” O. C. L. A. Sec. 18-604.

“When any person shall die seized of any real property, or any right thereto, or entitled to any interest therein, in fee simple, or for the

life of another, not having lawfully devised the same, such real property shall descend subject to his debts, as follows: (1) in equal shares to his or her children, and to the issue of any deceased child by right of representation; and if there be no child of the intestate living at the time of his or her death, such real property shall descend to all his or her other lineal descendants." O. C. L. A. Sec. 16-101.

XII.

A power of appointment may be validly exercised by a document executed prior to the actual creation of the power, if the intent to do so clearly appears.

Title Guaranty Trust Co. vs. Ebaugh, 184 N. Y. S. 351.

Stone vs. Forbes, 189 Mass. 163, 168; 75 N. E. 141.

41 Am. Jur. 833-5, Powers, Secs. 40-42.

49 C. J. 1284, Powers, Sec. 106.

This result is sometimes reached by the doctrine of *incorporation by reference*, even in jurisdictions which ordinarily say that a power lapses on the death of the donee prior to that of the donor.

In re Fowle's Will, 222 N. Y. 222; 118 N. E. 611, 612-13.

Matter of Piffard, 111 N. Y. 410; 18 N. E. 718; 2 L. R. A. 193.

XIII.

Although no particular form of words is necessary to the creation of a trust, there must at least be a

manifested intention that the one alleged to be a "trustee" should take title to certain property and hold it for the benefit of another. The mere use of the word "trustee" is not of itself sufficient to create a trust or to indicate that a trust was intended.

Scott on Trusts, Sec. 24.

The fee title and ownership of real property of a decedent passes immediately on his death to his heirs or devisees subject only to the payment of the debts of the deceased and the right of the personal representative to possession for the purpose of administration.

D'Arcy vs. Snell, 162 Ore. 351, 364; 91 P. 2d 537.

XIV.

Parol evidence of the acts or declarations of a testatrix are not admissible to explain, modify or vary the construction of a testament or to determine the nature or extent of the interest devised.

Hansen vs. Ore. Humane Society, 142 Ore. 104, 118; 18 P. 2d, 1036.

Re Estate of Hodgins, 110 Ore. 381; 221 Pac. 169.

Closset vs. Burtchaell, 112 Ore. 585; 230 Pac. 554.

Stubbs vs. Abel 114 Ore. 610; 233 P. 852.

Soules vs. Silver, 118 Ore. 96; 245 Pac. 1069.

Anno. 94 A. L. R. 26, 269:

“Since the nature or extent of the estate or interest devised is determined by the legal effect of the language of the will, this question must be determined by the process of construction according to established legal principles, and evidence of the testator’s declarations of intention is not admissible to show the character or quantum of estate intended to be devised.”

XV.

(A) Evidence of the practical construction of a will by the interested parties, if admissible at all, may be received only when the will is clearly ambiguous.

Campbell vs. Fowler, 226 Ky. 548, 11 S.W. (2d) 423, 428.

Eagen vs. Commissioner, 43 F. (2d) 881, 71 A. L. R. 863 (5 Cir.).

Bishop vs. Howarth, 59 Conn. 455, 22 A. 432.

(B) When practical construction is admissible, it is not for the purpose of showing the testator’s *intent*, but rather because the construction has become *independently binding* on the parties for some reason. In all the cases of this type there are some one or more of the following factors present:

(1) The property of the decedent has been divided and entirely distributed according to a certain construction of the will, and all parties have acquiesced for a considerable length of time.

(2) There has been a specific agreement of the

parties to a certain plan of distribution. If this is of the nature of a family settlement, the courts will go to some lengths to uphold it.

(3) The parties have disposed of the property among themselves or to outsiders, on the assumption of ownership, so that if the plan is upset, the property rights of third parties would be affected.

(4) The person against whom the construction is offered was himself a party to that construction, so that it comes within the nature of an admission.

Anno. 67 A. L. R. 1272.

Anno. 94 A. L. R. 26, 245.

CONSTRUCTION OF "DEATH WITHOUT ISSUE"

As was pointed out by the trial court (Tr. 44), controversies innumerable have been waged over the words "die without issue", and the construction of the phrase has changed with the time, the jurisdiction, the statutory background and public policy. In the course of decisions, at least four lines of approach have evolved for determining the effective date of the gift over in the limitation "A to B, and if B dies without issue, over to C."

Indefinite Failure.

At common law there was a presumption that such a limitation refers to *indefinite failure*—i. e. the gift over takes effect if B's line runs out *at any*

time in the future. This view created an estate tail in B with a remainder over to C. Prior to the Statute of Uses (1536) and the Statute of Wills (1540) such a construction was necessary, because there was no such thing as an *executory devise*, and the gift over had to be construed as a *remainder* in order to be good at all. This construction moreover harmonized with the strong emphasis on family lines prevalent in England at that time, under which an extensive system of entailment had grown up.

After the enactment of the Statute of Uses and the Statute of Wills, an executory devise was permitted, but concurrently the *rule against perpetuities* developed, under which, if the gift over took effect as an *executory interest* on an *indefinite failure*, it would be *void for remoteness*. The rule against perpetuities did not prohibit interests after a fee tail, however, for the estate tail could always be *barred* by the "common recovery", so the construction continued to be as a remainder after an estate tail, based on indefinite failure.

In this country a number of jurisdictions still retain the common-law meaning, in the absence of words indicating a contrary intent, while a number have rejected it in favor of some form of a definite failure construction, and at least 28 states have enacted the definite failure construction into statute. (See Warren, Gifts Over on Death Without Issue, 39

Yale Law Journal 332; Restatement Property, Sec. 266, Special Note).

As pointed out above (Proposition No. VII, *supra*, Page 10), if this clause is given its settled common-law meaning, the gift over would be void for remoteness, because there is no assurance that it would take effect within the period permitted by the rule against perpetuities. In that event, obviously Henderson's estate would be absolute.

Definite Failure

Under the *definite failure* rule, the limitation is construed so that the gift over takes effect, if at all, *on some definite date*, rather than on the failure of the line at any future time. As pointed out above, where this rule has been adopted it is generally by means of statute. In the field of property law, it is axiomatic that "it is better that the rule be settled, than that it be settled right"; and the courts are slow to upset property rights by changing settled rules, feeling that such changes are better left to the legislature.

Frequently, though not necessarily, in states which have not adopted the substitutional rule, the gift over is held to take effect on the death of the first taker. Thus C would take if B dies without issue living at the time of his death, no matter when B's death occurred.

It is not essential to the definite failure rule, however, that it refer to the death of the first taker—*any*

definite date will suffice. Thus the gift over may take effect upon the death of the first taker without issue prior to his *attaining a certain age*. The substitutional rule itself is a means for ascertaining a definite date, and is applied in many of the jurisdictions in which the preference for definite failure exists either by statute or decision.

Substitutional Rule

Under the *substitutional* rule, one or the other of the alternative limitations takes effect *at the death of the testator*. Thus if B dies without issue prior to the death of A, C takes absolutely upon A's death. On the other hand, if B outlives A, he takes absolutely upon A's death whether or not he subsequently dies without issue. The clause is construed to mean "death without issue *in the lifetime of the testator*," and C is *substituted* for B, if at all, upon the death of A. It is believed that this construction is followed by the weight of authority in the absence of language clearly indicating a contrary intent.

(Propositions Nos. VIII and IX, *supra*, Pages 11 and 12.)

A number of reasons have been given by the courts in explaining the preference for the substitutional construction. In the first place, it provides a definite date, in those jurisdictions where definite failure is established, and removes all uncertainty as to the time when the gift over is to take effect. In the second place, it gives effect to the policy of the

law in favor of the early vesting of estates, because the devise vests completely when the Will first speaks.

Furthermore, the substitutional construction is most likely to be in accord with the testator's actual intent, because it avoids any suggestion of repugnancy. When a testator gives an absolute fee in one clause, he is not likely to turn around and take it away in another, and he will not be presumed to have done so unless the intent clearly appears.

Again, there is a strong presumption that a testator intends to prevent a lapse in his disposition, as would usually happen if a devisee predeceased the testator. Consequently it is presumed that this clause was designed to avoid a lapse by giving the property to another if the first taker predeceased the testator. It is pointed out subsequently that this reason furnishes a very convincing argument for the substitutional construction in the present case.

Intermediate Date Rule

There is a further rule, as a phase of the definite failure construction, which has been adopted in some of the jurisdictions which do not follow the substitutional construction—namely: If there is any *intermediate date*, between the death of the testator and the death of the devisee, which can fairly be found, it will be used in preference to the death of the devisee; and if there are several possible intermediate dates, the earliest date which will vest the estate indefeasibly is preferred.

This rule again gives effect to the policy of the law in favor of early vesting, and it likewise enables the courts to determine from the Will as a whole whether there was any particular date deemed by the testator to be crucial to the plan he had in mind.

In the present case, it is possible that such an intermediate date might have been found in the twenty-five-year restraint on alienation in Paragraph 6 of the Will. However, since that restraint is void, there is no valid intermediate date which could be used.

THE OREGON CASES

Rowland v. Warren, 10 Ore. 129.

Here the will provided: "I further will that if my daughters, Martha Ann and Mary E. Hambree, die without children the land shall revert back to my other heirs."

Mary survived the testator and *died leaving children*. The court properly held that regardless of whether she took a fee simple or a fee simple conditional *the contingency did not happen* and a purchaser from her at judgment sale took absolute title. Hence the case could not and did not decide anything as to the meaning of "die without issue."

Buchanan v. Schulderman, 11 Ore. 150; 1 Pac. 899.

Here the will provided for a life estate in the testatrix' two daughters with contingent remainders

to the children of each daughter "or in case of the death of either of said daughters, without issue, then the children of the other daughter to take all of the same * * *."

The only question in the case was whether or not such a limitation was void as contrary to the rule against perpetuities. No question of the meaning of death without issue was or could be involved because the estate given to the daughters was not a fee simple subject to an executory limitation, but it was merely a life estate, and the limitation above set out merely operated to prevent a reversion in the event one of the contingent remainders should fail for lack of children living at the death of the life tenant. In other words, it was only a question of cross remainders and not a question of cutting down a fee.

Shadden v. Hembree, 17 Ore. 14; 18 Pac. 572.

The will here set up a life estate in the testator's wife, remainder to his son Henry L. Hembree "except as herein provided". Thereafter in the sixth clause of the will the testator provided:

"Sixth. It is my will that in the event that my beloved wife and son, Henry M. Hembree, shall die before my son shall become twenty-one years of age, that it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event mentioned, I do so will and bequeath the same to him".

The court held that upon the son surviving the wife, he took an absolute fee simple and that the

heirs of the nephew had no interest in the property.

With regard to the rule that where a definite failure of issue is intended, death prior to that of the testator is presumed to be referred to, the court states:

“* * * such is the settled rule where other parts of the will, *aside from* the words of absolute gift, followed by a gift over in case of death, *or death without issue*, do not indicate a contrary intention.”

The court here ruled that by the creation of a prior life estate in the wife giving her the use, control and management of the property, if she remained a widow, the testator intended the death of the son without issue to refer to his death prior to that of the widow.

Therefore, while the case is merely a dictum for the points here at issue, it is noteworthy that in so ruling the Oregon court adhered to the corollary of the general rule which is applied where there is a prior life estate created in the will with a remainder in fee subject to a limitation over in case the remainderman should die without issue; that is, the courts construe the will in such a case as giving to the remainderman an absolute fee at the earliest moment when he is given the right to possession, control, and freedom to sell or encumber a present interest and enjoyment in the property, to wit, immediately upon the death of the life tenant. This is a corollary to the settled rule that where there is no

prior life estate a death of the first taker prior to the death of the testator is intended where there is a limitation over upon death of the first taker without issue. And it is noteworthy that this corollary is laid down by the same courts which adhere to the settled rule in situations such as involved in the present case.

(Proposition No. X, *supra*, P. 13.)

Love v. Walker, 59 Ore. 95; 115 Pac. 296.

By his will the testator gave his son, Green C. Love, one of the six equal shares in his estate and then provided by *codicil*, as follows:

“Third, I hereby will, decree and declare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue, born alive and living at the time of his death, then the said devise or legacy to him shall belong and go to the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will.”

The court held that by reason of the fact that this provision occurred in a codicil the testator must have to some extent, intended to *revoke* his former gift, and that Green C. Love should be entitled only to a life estate with a remainder over in his issue living at the time of his death. The court, however, points out:

“The rule of construction prevailing in most

states of the Union is that a devise of a fee, coupled with a condition that if the devisee die without issue the estate is to go to others, means dying without issue in the lifetime of the testator, unless a different intention is manifest from the context of the will.”

★ ★ ★ ★

“If, after giving a fee to plaintiff, the will had also included the third clause of the codicil, it is possible that a presumption might be invoked that the condition of dying without living issue would be construed to mean the death of plaintiff before that of the testator, so that on the happening of the latter event the absolute estate would have become vested in Green C. Love of which he could not have been deprived on account of any failure of issue him surviving. But, however this may be, the legal principle thus adverted to can, in our opinion, have no application to the case at bar, for in so far as the codicil conflicts with the will it is the last expression of a testamentary disposition of property, revoking the will to the extent of the disagreement in their provisions and preventing a construction of their terms with reference to each other.” (59 Ore. 107-108)

It should also be noted that Mr. Justice Burnett delivered a dissenting opinion, ruling that since the son survived the period for distribution, he should then be entitled to take the property absolutely. And it is noteworthy that as to personal property, of which there is no transfer of title until time of distribution, this rule of limiting the devise over to the death of the first taker prior to the period of distribution is an exact corollary with the rule limiting

the devise over in the case of real property to his death prior to that of the testator.

Kaser v. Kaser, 68 Ore. 153; 137 Pac. 187.

Here the sole question was whether or not the plaintiff had any interest in the *personal property* of the testator's estate after the determination of the defendant's life interest in the property. By his will the testator provided first, a life estate for his wife; second, that upon her death his property should be divided between his children, and

“The third clause of the will is the paragraph the meaning of which is doubtful. It is there stated: ‘In the event that any of my children * * * die, leaving lawful issue, it is my will that said issue take the share left to their parent.’ The time of the death of such child is not specified. Whether such death was contemplated before the death of the testator, upon the death of the defendant, or at any other time, is not specifically indicated. That clause further provides that, if any of the testator's children should marry and die leaving a spouse but no issue, such surviving husband or wife was to take nothing by the will.”

The court examines this language and determines that it means a death after that of the testator and also determines that by use of the limitations concerning absence of issue in connection with the surviving husband or wife of such child the rule as to indefinite failure of issue did not apply, stating:

“In the third clause the testator directs that if any of his children should marry and die leav-

ing a husband of (or) wife surviving 'but no issue,' etc. Here the term 'dying without issue' evidently means a definite failure of issue; that is, dying without lineal descendants;"

Here again, the court simply rules that the legatees were given a life interest with the remainder over to their lawful issue and no question of cutting down a prior fee is involved since their life estate must terminate at their death, whether before or after that of the testator.

Bilyeu v. Crouch, 96 Ore. 66; 189 Pac. 222.

This case is likewise not a binding precedent for the one here before the court, because the estate of Frank Ingram was preceded by a life estate, and in such cases, as we have pointed out, the rule of construction that the death prior to that of a testator is intended, does not apply. The court, however, does not rely on any rules of construction but points out that by reason of the complicated series of limitations on the various estates created following the life estate, each being limited first to the male heirs and then to the female heirs of the devisee and then over to the other children, clearly the testator was not thinking in terms of the death of one of those children prior to his death. The court observed that the testatrix

"Although seized of a fee simple estate in the land, devised to her immediate beneficiaries a less estate. We note first the life estate to her husband; second, to Frank Ingram and the heirs

male of his body; third, in default of male children, to his daughters; and lastly, in default of issue of his body, to his sisters. *It was plain that the testatrix never intended that her son Frank should take an absolute fee-simple estate in the land.* It is manifest that she intended to control the stream of descent as it affected the land, long after her death. This is shown by the fact that she interposed a *life estate of her husband, which would not come into existence until after her decease* and which should be fulfilled before Frank Ingram could come into the enjoyment of the property."

As to the court's reference to the *Rowland* case, *supra*, it has been shown that it *could not possibly* have foreclosed the substitutional construction, because the question was not there presented.

Imbrie v. Hartrampf, 100 Ore. 589; 198 Pac. 521.

Here after giving certain land to his son, Ralph Imbrie, subject to certain restrictions on his right to sell or mortgage the same, the testator in paragraph twelve stated as follows:

" 'I further bequeath, devise and direct that should any of the above named devisees die without leaving lineal descendants, children or grandchildren, then in that case, all of the property above devised to such devisee shall go in equal shares to his or her brothers and sisters then living, or to the children of any brother or sister then deceased, by right of representation.' "

The court ruled that upon Ralph Imbrie surviving the testator he took an absolute title in fee simple to the real estate described in paragraph seven of the will. Apparently two contentions were made by the appellant, to-wit (1) that Ralph Imbrie was vested only with a life estate with the remainder over to his children or grandchildren; and, (2) that if Ralph Imbrie did get a fee it was a qualified fee determinable upon his death at any time without lineal descendents, children, or grandchildren (100 Ore. at 598).

In rejecting the contention that Ralph Imbrie got merely a life estate the court points out that the restriction upon alienation for a period until he was forty years of age merely indicated an intention that after arriving at the age of forty Ralph Imbrie should have full power of alienation of the property.

On the question of whether or not an indefinite failure of issue was intended by the use of the words "without leaving lineal descendents, children, or grandchildren," the court makes no definite statement with regard to the wording of that particular will, simply stating, as follows:

"An executory devise to take affect only upon an indefinite failure of issue is void under the rule as to perpetuities, for an executory interest, in order to be valid, must ake effect within the life or lives of those in being, and within 21 years thereafter, with the usual period of gestation added."

The court then goes on to take up the situation involved if a definite failure of issue is intended quoting from the case of *Love v. Walker*, and laying down the rule to be, as follows:

“Turning to the foundation of that enunciation, 25 L. R. A. (N. S.) 1059 et seq., we find among numerous authorities cited in the notes the following on page 1060:

“‘It is well settled that where the terms of the will indicate an intention that the primary devisee shall take the fee on the death of the testator, coupled with a devise over in case of his *death without issue, the words refer to a death without issue during the life of the testator*; and where the primary devisee, surviving the testator, takes an absolute estate in fee simple, this rule of construction is adopted in order to avoid repugnancy, and because the law favors the vesting of estates at the earliest possible moment, in the absence of a clear manifestation of the intention of the testator to the contrary: *Tarvell v. Smith*, 125 Iowa, 388 (101 N. W. 118).

“‘Where a bequest is direct and immediate, and nothing else appears to aid in the interpretation, the *law inclines to construe “die without issue” as meaning the death of the legatee without issue in the testator’s lifetime*: *Birney v. Richardson*, 5 Dana (Ky.), 424 * * *

“‘So, also, in *Washbon v. Cope*, 144 N. Y. 287 (39 N. E. 388), it is said that the rule is well settled that where a devise or bequest over to third persons is dependent upon *death without issue* or without children, *the death referred to is death in the lifetime of the testator*.’

“*The fact that our Code is closely related to those in the states of Iowa and New York lends*

weight to the opinions in those states. In the present case, instead of the language of the will, other than that in paragraph 12, manifesting an intention of the testator to devise an estate less than that of fee simple, the expression of the will of the devisor is to the contrary as we have noted.

“We therefore conclude that the proviso that in the event Ralph Imbris should ‘die without leaving lineal descendants, children or grandchildren,’ etc., was not inserted in the memorandum of the testator with the intention of debasing the fee devised to Ralph Imbrie, or indicating that Robert Imbrie proposed to give to this son an estate less than an absolute fee simple after he attained the age of 40 years without violating any of the restrictions embodied in paragraph 7.”

Thus, with regard to the Oregon authorities we would point out that the court never has squarely passed upon the common law meaning of the words “die without issue”, and also that the court has squarely recognized as the settled rule the construction presuming that the testator intends to refer to a death *prior to his own death* when he uses the words “die without issue” in a limitation over upon an estate given to a primary beneficiary. Furthermore, we find the Oregon court in each case where more than a life estate was given, ruling that the devisee shall be vested with the full fee simple title at the earliest moment when he would be permitted to enjoy the same under the terms of the will,—that is restricting the limitations to death before the testator,

or in the event there is a preceding life estate to death before the death of the life tenant.

Summarizing the Oregon cases then, the one most closely in point on the facts is that of *Imbrie vs. Hartrampf*, supra, in which, we believe, the Oregon Supreme Court rejected the "death at any time" doctrine and adopted the substitutional construction. In addition, the court had previously (*Love vs. Walker*) recognized that the substitutional rule is the majority rule in the United States. It is submitted, therefore, that if the question were presented in the Oregon courts today the substitutional rule would be followed.

With these legal principles in mind, we turn now to

THE PROVISIONS OF THE WILL

For convenience, the will is here set out in full:

"In the Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot

numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment to each of my grandsons—Matthew Edward Deady and Hanover Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking

fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life

time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Hender-

son Brooke Deady the undivided two-thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees herein named, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made.

In Witness Whereof, I have hereunto set my hand and seal this the 29th day of July, A. D. 1920, at Portland, Oregon.

(Signed) Lucy A. H. Deady (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) Chester V. Dolph
Residing at Portland, Or.

(Signed) J. V. Beach
Residing at Portland, Or.”

Taking up the provisions seriatim, we may pass over the first two paragraphs providing for the payment of her debts and the interment of her body.

Paragraph three devises to Henderson the undivided two-thirds of the property here in question, "*subject to the conditions, provisions and charges thereon hereinafter made.*" This paragraph cannot be considered apart from the following paragraph four which provides that "*subject to like conditions, provisions and charges thereon*", the remaining undivided one-third is devised to defendants Matthew and Hanover.

The gifts in these two paragraphs are couched in identical language, and by their express terms the interests given are subject to *exactly the same* "conditions, provisions and charges" Consequently it must be observed at the outset that the interest given to Henderson is of exactly the same *character* (although twice as large) as that given to Matthew and Hanover. No one has ever contended that Matthew and Hanover did not receive a fee in at least the one-third referred to in Paragraph 4, and the conclusion is inescapable, taking the Will thus far, that the same character of interest is given to each, and that the "conditions, provisions and charges" referred to must apply to all three devisees equally or not at all.

Furthermore, the language presumptively creates a fee in each of them unless the "conditions,

provisions and charges" are clearly such as to derogate *from the estate itself* and not merely from the income or from some other *attribute* of the estate. Thus a mere charge on the income or an attempted accumulation or restraint on alienation would not affect the passing of the fee, but, if valid at all, would merely restrict its use.

It is the statutory rule in Oregon that words of inheritance are not necessary to create a fee simple, and a devise is presumed to be of all the testator's interest unless an intent to devise a lesser estate *clearly appears from the Will*.

O.C.L.A., Sec. 18-603; 70-105. (Quoted *supra*, p. 8.)

Under the Oregon statute, confirming the common-law rule, it is held that a fee once given will not be held to have been debased or cut down by subsequent words of vague or doubtful import, but such intent must be *clearly expressed*.

(Proposition No. IV, *supra*, p. 8.)

Defendants argue that the "subject to" clause gives notice that an absolute fee was not intended, but merely a qualified or defeasible one. This could be true only in the event that some subsequent clause clearly provided for the *disposition of the property itself* and did not deal merely with the income or other attributes, for in the latter event the qualification would not affect the passing of the fee. Furthermore, the qualification would still

have to be one applicable to Matthew and Hanover as well as to Henderson, for the "subject to" clause, by express language, refers only to conditions, provisions and charges which are applicable to all three equally.

Paragraphs 3 and 4, therefore, taken by themselves, must be held to have devised a fee in two-thirds to Henderson and one-third to Matthew and Hanover, unless the later restrictions are such as clearly affect *the estate itself*, and not merely some of the *attributes* of the estate. Likewise the same restrictions must apply to all three of the devisees in exactly the same manner, or not to any of them.

Paragraph five sets up certain "charges" on the income from the property, namely the payment of the sum of \$150.00 per month to Mary, widow of Edward, for her lifetime; \$75.00 per month to Marye, widow of Paul, for her life; \$100.00 each per month to Matthew and Hanover during the lifetime of Henderson; and the remainder of the income to Henderson for his life. In each instance, the testatrix uses apt language to express her intent as to the duration of the charge—i. e. "to Mary . . . during the term of her natural life"; "to Marye . . . so long as she survives"; and to Matthew, Hanover and Henderson "during the lifetime of my son, Henderson." From this it must be inferred that if she had intended any such similar limitation on the estate given to Henderson, she would clearly have expressed it. As stated in the *Imbrie* case, *supra*,

“it would have been the most natural thing for whoever drafted the will to have used the words ‘during his natural life’ or words of like import” (100 Ore-at 595).

With respect to the latter charges,—i. e. to Matthew, Hanover and Henderson—it should be noted that their duration is further limited by Paragraph 9 to ten years from the death of the testatrix, instead of the full lifetime of Henderson, as in Paragraph 5, after which period of ten years the income is to “*follow the title and ownership of said real property*”—two-thirds to Henderson and one-third to Matthew and Hanover, subject to the charges in favor of her daughters-in-law.

Paragraph 5 sets up, as an additional charge on the income, the payment of inheritance taxes and the accumulation for an indefinite period of a certain portion of the income from the property in a sinking fund for the retirement of the mortgage debt thereon. Since there is no duration prescribed for the accumulation, and the period might outrun that permitted by the rule against perpetuities, the provision for the sinking fund is obviously invalid.

(Proposition No. V, *supra*, p. 9.)

Paragraph six attempts to impose a restriction on the alienation or encumbrance of the property, except for certain purposes, for an absolute period of twenty-five years after the death of the testatrix. The attempted restraint is expressly made a “*con-*

dition” to the devises to Matthew, Hanover and Henderson. This provision likewise violates the rule against perpetuities and against restraints on alienation, inasmuch as it is based on an absolute period in gross greater than twenty-one years and is repugnant to the nature of an estate in fee, which was unquestionably granted at least to Matthew and Hanover.

(Proposition No. V, *supra*, p. 9.)

It is believed that defendants do not question the invalidity of the provisions for the accumulation and the restraint on alienation or incumbrance, but argue merely that plaintiff has no standing to raise the question until he first establishes an interest in the property. It is submitted that the discussion herein will show conclusively that he does have such an interest, but the relevancy of the inquiry is not limited to that event, for the invalidity of these portions is itself a strong ground for holding that Henderson acquired a full fee to two-thirds of the property upon the death of the testatrix.

It is settled that where the invalid portions of a Will are so closely interwoven with the valid ones that they cannot be separated without seriously upsetting the general testamentary scheme, the entire plan of distribution will be held invalid.

(Proposition No. VI, *supra*, p. 9.)

When the entire Will has been considered, it will be apparent that the plans of the testatrix with

respect to this property were inextricably bound up with the attempted restraint on alienation and the attempted accumulation of the income, so that if those features were to be excised, her plan would be seriously disrupted, and the entire scheme should therefore fail. In that event, the property would go by the residuary clause in Paragraph 12, two-thirds to Henderson and one-sixth each to Matthew and Hanover.

Furthermore, in Paragraph 6, the testatrix states explicitly that the previous devises to Matthew and Hanover and to Henderson “are upon the *express condition* that said property shall not be disposed of or encumbered” during the unlawful period of twenty-five years. The only conclusion to be drawn from this language is that if such disposition or encumbrance were made, or if the condition could not be enforced, the devise was not intended to be effective. In that event, since no alternative disposition is made, the property would have to go by the residuary clause.

The restraint on alienation in Paragraph 6, though invalid, is of further significance, however, in that it indicates that at the end of the twenty-five-year period Mrs. Deady intended that the respective devisees should have full power of alienation or encumbrance over the described property. A restriction on alienation for a limited term carries with it an implied grant of the power of aliena-

tion at the expiration of that term. (*Imbrie* case, *supra*, 100 Ore. at 595).

Likewise in this paragraph, the testatrix expressly recognizes the fact that the mortgage then encumbering the property might need to be renewed or refinanced. Yet in order to accomplish a refinancing of the mortgage, Henderson would need to have a fee simple title before his mortgage on the two-thirds interest would be acceptable. These factors corroborate the finding that Henderson was intended to have a full fee upon Mrs. Deady's death, just as it is admitted that Matthew and Hanover were to have.

Paragraph seven of the Will, which raises one of the crucial issues of the case, provides as follows:

“That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212 shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.”

As pointed out above, it is plaintiff's contention that this clause has reference only to Henderson's death without issue *during the lifetime of the testatrix*, and since he outlived her, his fee simple in two-thirds became absolute, even though he later died without having had children.

The construction to be placed upon the phrase “die without issue”, as regards the time for taking

effect of the gift over, has been considered above in the light of the cases.

(Propositions No. VII-X, *supra*, pages 10-14.)

Our concern at this point is with the *actual intent* as it can be gleaned from the Will itself, apart from rules of construction.

At the outset, we may state simply that when a testatrix obviously has so little regard for the rule against perpetuities and related rules of law as in the present case, it would be entirely consistent with her expressed intent to give the phrase "death without issue" its settled common-law meaning of indefinite failure, and to say that she was actually attempting to create a future interest to become effective whenever his issue might fail *at any time*. Such a limitation would of course be void for remoteness, but as is pointed out in *Closset vs. Burtchaell*, 112 Ore. 585 at 601,

"Every provision of a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied."

On the other hand, if we say that the testatrix was thinking only of the death of Henderson without *children*—i. e. some form of *definite failure*, whether to take effect on her own death, on Henderson's death, or at some intermediate date—then it seems clear from the entire Will that she would want his estate to fully vest in him upon her own

death. That is, the gift over was by way of substitution, rather than by way of executory devise, and was to take effect, if at all, *upon her own death*, if Henderson had died without issue *prior to that time*.

It should first be observed that after Paragraphs 3 and 4 have devised the fee, the rest of the complicated structure of legacies and restrictions, with the exception of Paragraph 7, has nothing whatever to do with the devolution of the fee itself. There has been an express *condition* set up in the attempted restraint on alienation; *provision* has been made for a sinking fund to retire the mortgage; and the income has been *charged* with certain payments. The "title and ownership" of the land, however, remain throughout divided two-thirds to Henderson and one-third to Matthew and Hanover. There is nothing in the Will, therefore, to derogate in any way from the fee expressly given in Paragraphs 3 and 4 unless it be the "death without issue" clause in Paragraph 7.

It is equally clear, however, that Paragraph 7 is not one of the "conditions, provision and charges" referred to in Paragraphs 3 and 4, since by the express terms of those paragraphs, the "conditions, provisions and charges" are stated to be identical for the gifts to Henderson, Matthew and Hanover, while Paragraph 7 can obviously refer only to the devise to Henderson and has no application to the gifts to the grandsons. Therefore, since the testatrix placed certain limitations upon the gift to

Henderson, but did not include this provision among those limitations, a question is raised as to just what effect she intended Paragraph 7 to have. It has been pointed out above (Proposition No. IV, *supra*, p. 8) that a fee once given will not be cut down by subsequent words unless the intent is *clearly and expressly stated*, and since Paragraph 7 does not clearly express such an intent but serves only to introduce uncertainty, it must be held that this clause does not operate to debase or cut down the fee previously given.

Likewise, the position of Paragraph 7 in the Will, embedded in a series of provisions dealing with the income rather than with the fee, does not serve to clarify the intent, but increases the doubt that she thereby intended to cut down the fee.

The mere fact that the fee given to the grandsons was to be enjoyed by them upon terms which had no relation to the death of Henderson is of itself a convincing argument that the gift to Henderson was upon the same terms and was not intended to be cut down.

Defendants place great reliance upon the use of the word "vest" in this paragraph, arguing that the property could vest in Matthew and Hanover only upon Henderson's death occurring after that of Mrs. Deady, and therefore that she must have intended the gift over to take effect only after her own death. The argument is a complete *non sequitur*, however, for it is just as reasonable to say

that the gift over to the grandsons would vest in them (as it surely would) *upon Mrs. Deady's death*, if Henderson had died during her lifetime. In fact, the use of the word "vest" is much more consistent with plaintiff's theory, in the light of the present tense of the rest of the clause:

"I give and devise the same to my said grandsons."

This language clearly seems to be speaking *as of the time of her death*; and if, *at that time*, Henderson had died without issue, then her Will would operate as a present devise to them, the property to "vest" in them immediately. This seems to indicate an intent to *substitute* the devise to the grandsons for that to Henderson, *on her own death*, if at all.

Defendants also argue that if Mrs. Deady had intended a substitutional devise only, the gift over would have been unnecessary, because if Henderson had predeceased Mrs. Deady, Matthew and Hanover would have taken all of Henderson's interest under the Will, by virtue of the Oregon laws of descent.

This implies a misconception of the Oregon lapse statute, and rather than supporting defendants contention, it illustrates perfectly the practical reason why Mrs. Deady must have intended a substitutional devise. The Oregon statute preventing lapse of a devise is applicable only where the devisee leaves *lineal descendants*. It would not oper-

ate to transfer a devise to nephews of the deceased devisee, such as were Matthew and Hanover. We quote the entire section, O.C.L.A. Sec. 18-604:

“When issue of deceased devisee takes estate. When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator.” (Italics supplied.)

It is obvious that under this statute, if Henderson had predeceased the testatrix, without issue, the gift to him would have lapsed, for Matthew and Hanover were not *lineal descendants of his*, so as to invoke the lapse statute. Instead of taking Henderson’s share under the Will therefore, Matthew and Hanover would have taken it as on *intestacy*, as the only lineal descendants of *Lucy*.

“When any person shall die seized of any real property not having lawfully devised the same, such real property shall descend subject to his debts, as follows: (1) in equal shares to his or her children, and to the issue of any deceased child by right of representation; and if there be no child of the intestate living at the time of his or her death, such real property shall descend to all his or her other lineal descendants.” O.C.L.A. Sec. 16-101.

By taking the property under intestate succession, however, the grandsons would take it *free*

from all the "conditions, provisions and charges" which Lucy had attempted to impose by her Will, and thus we have a very cogent reason why Lucy was concerned with the event of Henderson's death before her own.

One of the outstanding things about the Deady Will is the elaborate structure of legacies and restrictions which she attempted to set up about this property. She provided monthly incomes for her daughters-in-law, for her grandsons and for Henderson; she charged the income with the payment of the inheritance taxes; she attempted to set up a sinking fund from the income to retire the mortgage debt; she attempted to restrain the alienation or encumbrance of the land for a period of twenty-five years—all these apparently with the view of keeping the property itself intact, and providing for the family out of the income alone.

But this entire scheme would fail if Matthew and Hanover took the two-thirds by intestacy, freed from the restrictions of the Will; for then they would be free to dispose of or encumber that interest at their pleasure, ignoring the legacies to their aunts if they so wished. This was the *very thing* that Mrs. Deady was attempting to prevent, and it would happen *only* in the event that the primary devise to Henderson should lapse by his death without issue *prior to her own death*.

If he outlived her, there would be no lapse, but the property would stay subject to the Will in any

event. If he died before her death, leaving issue, his descendants would take his share by virtue of the lapse statute, again subject to the Will. But if he died *before her death without descendants*, the devise to him would lapse, and that share would go by intestacy free from all her intended restrictions. This reason, if there were no other, would itself be convincing that the contingency with which she was principally concerned and for which she attempts to provide by Paragraph 7 was the event of Henderson's death without issue *during her own lifetime*. She provides that in that event, Matthew and Hanover would take his share, *subject to* the charges and restrictions in the Will.

It is submitted therefore, that the plan of the testatrix will best be effectuated, and her intent most nearly carried out by construing Paragraph 7 as a *substitutional* devise, to take effect *on her own death*, only in the event that Henderson had died without issue *prior to that time*. Since he outlived her, his fee became absolute and passed to his widow and then to the present plaintiff, even though he eventually died without leaving children.

Paragraph eight of the Will makes provision for the widow of Henderson out of the income of the property similar to that made in Paragraph 5 for the widows of the other two sons. By it, Henderson was authorized and permitted to bequeath to his wife (if he then has a wife) for her lifetime,

the income that would have been derived from the property by him if living.

Defendants attach great significance to this paragraph, arguing that it would have been unnecessary if Henderson had taken a full fee in the two-thirds, and that it therefore shows that he was not intended to have the fee. But this argument completely ignores the effect intended by the testatrix that the restraint on alienation should have:

“The devises are upon the express condition that such property shall not be disposed of or encumbered during the period aforesaid.” (Par. 6).

If that restraint had been valid, Henderson could not have devised the fee to his widow if he died prior to the twenty-five-year period, unless perhaps to take effect on the expiration of the period, although it is doubtful whether that would have been valid, since it might not have vested within twenty-one years from his death. The power of appointment in Henderson was obviously to enable him to provide for his widow in the event that he died during the twenty-five-year period when the testatrix intended that he should not have a power of alienation.

The fact that Henderson exercised this power by his will is likewise of no great aid to defendants, for it merely shows that he recognized the restraint on alienation which his mother had attempted to

impose. Even though that restraint was not legally binding upon him, he apparently recognized it as a moral obligation. His acquiescence did not validate the restraint, and when the rule of law steps in to strike it down, his rights are not to be prejudiced merely because he heeded the expressed, though invalid, desire of his mother.

Defendants likewise contend that the power of appointment in Paragraph 8 shows that in the seventh paragraph Mrs. Deady was referring to Henderson's death without issue *after* her own death and not *before*, arguing that the power would lapse if Henderson predeceased her. But it does not follow, even if the testatrix had in mind his death after her own in this respect that she therefore had the *same date* in mind with respect to the provision for his death without issue. She may well have considered both possibilities in separate parts of the Will.

As shown above, we believe she intended that if Henderson survived her he would take a full fee, and yet be unable to devise or convey that fee because of her attempted restraint on alienation. It is entirely consistent with her expressed wish that she intended (1) if he predeceased her without issue, although his fee would be defeated, he could continue his share of the income to his widow; and (2) if he survived her, though his fee would be complete, he would still be unable to devise it because of the twenty-five-year restraint, and the power of

appointment was a means for providing for his widow in that event.

However, if the power were taken to refer only to the death of Henderson *after* her own death, as defendants urge, it would also be void for remoteness, because there is no certainty that Henderson's widow would be a person in being at the time of Lucy's death, or that the charge in her favor would not run for a period greater than 21 years after lives in being at Lucy's death. This possibility is expressly recognized in the Will in the parenthetical clause "if he then has a wife". If, as suggested by defendants, therefore, the power would lapse if it referred to his death *prior* to hers, it would in the alternative be void if it referred to his death *after* her own.

It is not conceded, however, that the power could not be validly exercised prior to Mrs Deady's death. It is true that a general power of appointment, which would permit the donee of the power to transfer the property to anyone he should name, is ordinarily said to lapse upon the death of the donee. However, the actual reason behind the decisions usually is that the donee of the power has in his Will merely made mention of "any and all powers of appointment" and actually had no intention to exercise the particular power, perhaps because he had no knowledge of it prior to the death of the donor. The special power given in the Will of Mrs. Deady, however, might be exercised by a document

executed before her death, provided the donee of the power clearly intended to exercise that particular power of appointment. This is pointed out in 49 C. J. 1284 where it is stated:

“A power may be validly exercised by a Will executed prior to the creation of the power, where the intention to exercise such a power appears.”

This actually occurred in the case of,—

Title Guaranty & Trust Co. v. Ebaugh, 184 N. Y. Supp. 351,

where on February 21st the donee of the power was told that the trust containing it was going to be created, on the 18th day of April he executed the power, and the trust was thereafter created on July 3rd. This was held to be a valid execution of the power given in the trust.

Likewise in the case of,—

Stone v. Forbes, 189 Mass. 163 at 168; 75 N. E. 141.

the court pointed out:

“It is settled in this Commonwealth that a general power of appointment is well executed, in the absence of anything to show a contrary intention, by a general residuary clause in the will of the donee of the power. *Armory v. Meredith*, 7 Allen, 397. *Willard v. Ware*, 10 Allen, 263. *Bangs v. Smith*, 98 Mass. 270. *Sewall v. Wilmer*, 132 Mass. 131. *Cumston v. Bartlett*, 149 Mass. 243. *Hassam v. Hazen*, 156 Mass. 93. And, whatever may have been the case formerly, that is now the law in England. *Airey*

v. Bower, 12 App. Cas. 263. *Boyes v. Cook*, 14 Ch. D. 53. *And both in this Commonwealth and in England the fact that the power is created after the execution of the will does not prevent the will from operating as an execution of the power.* *Willard v. Ware*, 10 Allen, 263. *Osgood v. Bliss*, 141 Mass. 474. *Airey v. Bower*, ubi supra. In England these results have been arrived at by means of statutory enactments. But in this Commonwealth they have been reached by the application of general principles. In this case, however, the power is a special one, and it is contended that different rules apply."

And as stated by the editors of *Am. Juris.* at 41 A. J., 835,

"There seems to be no reason why a special power cannot be executed by a will of prior date, if the proper intent can be gathered from the will."

In the present case, where the beneficiary of the power is specifically designated, as well as the interest to be appointed, and the circumstances are such as to indicate that Henderson might well know of the existence of the power prior to the death of Mrs. Lucy Deady, there is certainly the strongest case for holding that the exercise of the power prior to the death of the testatrix would be valid.

Furthermore, even in jurisdictions where it is stated that a power lapses on the death of the donee, the same result has been reached by the doctrine of *incorporation by reference*, which gives effect to

the donee's will, where that is the clear intent, even though the donee may in fact have predeceased the donor. As stated by Justice Cardozo in the case of *In re Fowle's Will*, 222 N. Y. 222, 118 N. E. 611, 612-613, cited by defendants:

The intent to avert the consequences of a lapse is clear. The only question is whether the intent is one to which the law will give effect. One obstacle, and one only, can be thought of. That is the rule against the incorporation of extrinsic documents, testamentary in character, but not themselves authenticated in accordance with the statute. It is said that this rule is violated when a testator, to keep a power alive, ratifies its execution, adopts the will which executes it as his own, and thus in effect averts a lapse. We do not share that view.

Everything that this testator did is justified by our decision in *Matter of Piffard*, 111 N. Y. 410, 414, 415, 18 N.E. 718, 719 (2 L.R.A. 193). * *

Piffard's case cannot be distinguished. It ought not to be overruled. Only the clearest error would warrant us in baffling the just hopes and purposes of this testator by disregarding a decisive precedent. But there are substantial reasons to support the view that the decision was right. The reasons may appeal with different strength to different minds. * * *

It is plain, therefore, that we are not to press the rule against incorporation to 'a dryly logical extreme.' *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. We must look in each case to the substance. We must consider the reason of the rule, and the

evils which it aims to remedy. But as soon as we apply that test, the problem solves itself. There is here no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose. He has not limited his wife to any particular will. Once identify the document as her will; it then becomes his own. He authorizes her to act, and confirms her action. *Condit v. DeHart*, supra, at page 81 of 62 N. J. Law at page 776 of 40 Atl. For the purpose of the rule against incorporation, the substance of the situation is thus the same as it always is when a will creates a power. The substance is that a power which would otherwise have lapsed has been kept alive by the declaration that its execution, however premature, is ratified and approved. But the execution of a power does not violate the rule against incorporation. It can make no difference for that purpose whether the execution is authorized in advance or made valid by relation."

In *Matter of Piffard*, 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193, referred to in the foregoing quotation, it was stated that the will of the donee (who died before the power became effective on death of the donor) is referred to,—

"not as transferring the property by an appointment, but to define and make certain the persons to whom, and the proportions in which, the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime."

In the present case, it is not even necessary to

look to the donee's Will to ascertain those facts, for the ultimate beneficiary and the amount of the interest to pass are both ascertained by the Will of the donor herself. The present case is certainly a much stronger one, therefore, for upholding the validity of a prior exercise of the power

As stated at the outset, however, even if Lucy did have in mind the event of Henderson's death *after* her own with respect to the power of appointment, it by no means follows that she necessarily had the same event in mind with respect to the failure of issue, as defendants seek to infer

Paragraph nine provides that the monthly payments to Matthew, Hanover and Henderson, previously set up in Paragraph 5, shall be limited to ten years after her death instead of for Henderson's life as provided in Paragraph 5. At the end of the ten-year period, the net income, after payment of the legacies to the widows of the other two sons, "*shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons.*"

This provision alone is certainly strong evidence that Henderson was to receive a full fee to the two-thirds of the property, since the clause refers to "the title and ownership" in him of that amount.

Paragraph ten devises certain other real estate to Henderson, concerning which no question is

raised, and Paragraph eleven bequeathed to Hanover the law library of the testatrix.

Paragraph twelve provides that all the residue of the testatrix' property shall go in the proportion of two-thirds to Henderson and one-sixth each to Matthew and Hanover, thus indicating, along with the other provisions of the Will, the general plan of the testatrix to divide her estate in that proportion—two-thirds to the surviving son and the remaining one-third to the grandsons. Henderson was the chief beneficiary of her Will and the primary object of her bounty.

By the last clause of her Will the testatrix named Henderson and Joseph Simon as co-executors. The fact that she provided for a co-executor indicates that she had in mind the possibility of Henderson's not surviving her, and this again is of weight in determining that Paragraph 7 referred to the death of Henderson within her own life.

THE WILL AS A WHOLE

Viewing the Will as a whole, therefore, certain features are outstanding which characterize the entire instrument. One of the first of these is that the Will was obviously drawn by a lawyer—it is phrased in technical language and replete with conditions, charges, powers, devises and legacies. Having used words of settled legal significance, she is presumed to have intended their technical mean-

ing, for her attorneys were undoubtedly merely phrasing the Will to give expression to her intent.

Another feature immediately apparent is that Henderson was the chief object of the testatrix' bounty. He was her sole surviving, and apparently favorite son. He is the first devisee mentioned; he is given the largest share of the realty, the largest share of the income, and the largest share of the residuary estate. Another parcel of land is given to him in fee simple. He is named as a co-executor of the Will. Clearly, if there is anyone for whom Mrs. Deady would have desired to create an absolute estate, it was for her son Henderson; and her natural desire coincides with the statutory presumption that she intended to give him her entire estate in the land unless her intention to give a lesser amount is clearly expressed in the Will. But nowhere in the Will can there be found any such clearly expressed intent to debase or cut down the fee given by the primary devise, although it would have been the simplest matter for her attorneys to have so stated if that had been her desire.

The next outstanding thing about the Will is the elaborate structure of legacies by which she attempted to provide for the family out of the income from the property. To insure that this comprehensive scheme would be carried out, she subjected the primary devisees to the payment of the specified charges, provided for the retirement or refinancing of the mortgage debt, and attempted to restrain the

alienation or encumbrance of the land for a period of twenty-five years. Obviously that construction of the Will should be adopted which most nearly gives effect to her desires, so far as that can legally be done.

As pointed out above, the greatest threat to this plan—apart from the rule against perpetuities—was the possibility that Henderson might predecease her without issue, so that his share would lapse and go to Matthew and Hanover as on intestacy, free from all the restrictions which she had attempted to impose. A lapse was to be feared only if he died without issue prior to her death, and it was largely for this purpose, it is believed, that the death without issue clause was inserted—to prevent a lapse and insure that if Matthew and Hanover did take Henderson's share, they would take it subject to the terms of the Will and not free from her restrictions.

When this very practical reason harmonizes so well with the substitutional construction which the Oregon Supreme Court recognizes as being the weight of authority, it is submitted that the clause must be held to refer only to Henderson's death without issue *during the lifetime of the testatrix*, and that upon his surviving her, he took an absolute estate in fee which passed by successive devises to the present plaintiff.

NO TRUST CREATED

We believe it is apparent without extended discussion that there was no real trust created under the Will. Although the testatrix used the word "trustee", the fee title was granted to the grandsons and to Henderson. The executors were merely given the right to collect and distribute the income, pay the specific legacies and create a sinking fund. The power to renew the mortgage was given to the fee owners, and the restriction against alienation was placed directly against them, not against the executors. As pointed out by the Oregon Supreme Court in the recent case of *D'Arcy vs. Snell*, 162 Ore. 351, 364:

"9. The fee title to and ownership of the real property of a decedent passes immediately on his death to his heirs or devisees subject only to the payment of the debts of deceased and the right of the personal representative to possession for the purposes of administration: *King v. Boyd*, 4 Or. 326; *Noon's Estate*, 49 Or. 286, 291, 88 P. 673; *De Bow v. Wollenberg*, 52 Or. 404, 96 P. 536, 97 P. 717; *Stadelman v. Miner*, supra; *MacKenzie v. Graham*, 159 Or. 687, 82 P. (2d) 884."

PARTIES

As to the alleged absence of necessary parties, it should be sufficient to point out that recovery is not being sought here for the benefit of either the estate of Henderson or Charlotte Howell Deady, but rather for the son of Charlotte, and he is *still living*. The

present plaintiff is the owner by successive devises of whatever interest either Henderson or Charlotte had to devise, and title passed to him immediately upon the death of his mother (*D'Arcy vs. Snell*, supra). He is the real party in interest and the only one to whom any recovery could accrue. What possible interest the executors of the two estates could have is not readily perceived.

EVIDENCE ADDUCED AT THE TRIAL

Admissibility

As to those portions of the offered evidence which were excluded by the trial court, the following observations should be sufficient:

(a) As to the oral expressions of the testatrix (Tr. 264-70, 385-7, 390-4, 399-401, 406-7, 411-15), the rule is clear that parol evidence is not admissible to explain, modify or vary the construction of a Will. (Proposition No. XIV, supra, page 16). While construction was required, there was no ambiguity in the Will as to the devolution of the fee. If parol evidence of the estatrix were admissible in this case it would be so in any case, and the formalities surrounding the execution of a Will would be entirely destroyed.

(b) The acts or statements of the executor of Henderson's estate (Tr. 205-7, 212-3) are not in any way binding upon the present plaintiff because there is no privity of interest between them. The trial court

admitted declarations of Henderson himself, partly on the theory that they might be admissions of a prior holder of the title. But the executor of the estate does not hold the title to the property, merely having possession for the purposes of administration, and no act of his could be in any way binding on a subsequent holder of the fee. In addition, of course, they are purely hearsay—the acts of one not a party to the suit, offered as proof that what they purport to say is true.

(c) Likewise, any statements that Chester Dolph may have made to Mr. Weinstein (Tr. 224-5) were between persons not parties to this case, reporting in turn matters which others were alleged to have told Mr. Dolph, and not binding in any way upon the present plaintiff.

(d) The matters with regard to the State Inheritance Tax were properly excluded. As the trial court stated (Tr. 121), what relevancy these matters might have is inconceivable. “The state will not be foreclosed from collecting what the law allows.”

(e) The letters sought to be introduced as defendants’ exhibits “Q” and “R”, being letters from Wilbur, Beckett & Howell to Simon and the reply (Tr. 445, 451) were of course properly rejected as being entirely hearsay, between persons not parties to the litigation, and attempting to report matters coming from still a third party.

Effect of the Evidence

As we understand the defendants' contentions, they seek to establish chiefly two things by the evidence offered at the trial: (1) a waiver or estoppel of some sort against Henderson; and (2) a practical construction of the will by the interested parties.

With respect to the first of these, it is submitted that the elements of an estoppel are not present, because even assuming that Henderson had told the others he did not take an absolute fee under the Will, this was at most a statement of law or opinion merely and not of fact. Furthermore, if he had made such statements, Matthew and Hanover would have had no right to rely on them, because they had as complete a knowledge of the facts as he did, and they were advised by counsel who knew the terms of the will and were better qualified to form an opinion than was Henderson. Mere silence on Henderson's part is of no avail to defendants, for he was under no duty to speak up and advance his contentions.

Likewise the evidence falls far short of establishing a waiver, because there is no "intentional" relinquishment of a known right." The most that could be said is that Henderson might have been mistaken as to his rights as a matter of law.

As to a practical construction by the interested parties, extrinsic evidence of that nature is admissible only where the will is clearly ambiguous, and the

extrinsic evidence itself is unequivocal.

Campbell v. Fowler, 226 Ky. 548; 11 S. W. 2d 423, 428.

Eagen v. Commissioner, 43 F (2d) 881, 71 A. L. R. 863 (5 Cir.).

Bishop v. Howarth, 59 Conn. 455, 22 A. 432.

As pointed out above, in the present case there is no ambiguity as to the devolution of the fee when the will is considered by itself, and evidence of this nature could only serve to introduce uncertainty.

However, we have carefully considered the Annotations cited by defendants from 67 A. L. R. 1272 and 94 A. L. R. 245, and it is believed that all of the cases cited therein will fall into one or more of the following classes, based on their respective facts:

(1) Where the property of the decedent has been divided and entirely distributed according to a certain construction of the will, and all parties have acquiesced in the division for a considerable period of time;

(2) Where there has been a specific agreement of the parties to a certain plan of distribution, expressly arrived at. Where this is in the nature of a family settlement, the courts will go to some lengths to uphold it;

(3) Where the parties have disposed of the property among themselves or to outsiders on the assumption of ownership, and to upset the arrangement would injure innocent parties;

(4) Where the litigant against whom the construction is offered was himself a party to the construction, so that it is in the nature of an admission.

In those kinds of cases, the construction is received as *independently binding* on the parties. But when the construction is offered as tending to prove the *intent* of the testator, then it is rejected as parol evidence and pure hearsay.

(Proposition No. XV, *supra*, p. 17.)

In the present case, none of these factors are present, for the property of the decedent has remained intact, there has been no express agreement, no innocent third parties have intervened, and the present plaintiff was not in any event a party to the construction. Even though Henderson might have been a party to such a construction, this is not binding upon the present plaintiff as a vicarious admission. When admissions of a predecessor in title are received against a subsequent holder of the title, it is on the theory that the predecessor was in *similar circumstances* and had only the *same motives* as the present party, which is obviously not the case between Henderson and the present plaintiff (Wigmore on Evidence, 3rd Ed., Sec. 1080).

The case of *Moore vs. Moore*, 121 Or. 48, 252 Pac. 964, cited by defendants involves several of these features, for there the will was held to be clearly ambiguous, and the family had joined in conveying the property to a managing trustee, the deed reciting

that each owned a one-eighth interest. Later, the defendant sold a one-eighth interest to another of the family under circumstances clearly indicating a desire to convey all her interest. When she later attempted to claim a larger share, the court construed the will against her claim on the grounds that the parties had adopted a contrary construction between themselves.

The case is clearly a remote one from the present case, because there the parties had embodied their construction of the will in a specific written agreement, the claimant had already sold her supposed interest to another, and the circumstances showed a family settlement acquiesced in by all the parties.

In *Stubbs v. Abel*, 114 Or. 610, 233 Pac. 852, cited by defendants, it does not appear that the construction by the parties was of any significance to the decision, the court expressly stating:

“This will contains no ambiguity as to beneficiaries or as to things bequeathed or devised; and we shall not resort to surrounding circumstances for the purpose of imparting into the will an intention not therein expressed.”

As far as the various stipulations signed by the family are concerned, it is apparent that none of them had for its purpose a construction of the will as to the devolution of the fee, but they were concerned only with redistributing the income on the basis of an entirely new and separate agreement.

In the negotiations all the parties were represented by counsel.

Before leaving the matter of the evidence introduced at the trial, however, there is one factor to which attention should be called. It appears (Defendants' Ex. D, Tr. 291) that prior to Mrs. Deady's death the property in question had belonged to her three sons in equal shares, subject only to a life estate in her favor. It had been so devised by her deceased husband, the late Judge Deady. In order to refinance the property the boys joined in conveying the fee to her. It was subsequently claimed by Marye Thompson Deady, widow of Paul, that the conveyance to Lucy was solely in trust, and that the fee should return to the heirs of the three sons equally. She brought suit to compel this result, but dismissed it upon receiving a larger share of the income. (Defendants' Ex. E, Tr. 307).

This is significant because it shows an additional reason why Lucy would have intended to convey only a one-third interest to Matthew and Hanover—the one-third which their father, Edward, had previously owned. Since Paul left no descendants, it was the most natural thing for her to leave Paul's share to Henderson, along with his own, and give Edward's share to his two sons.

IN CONCLUSION

It is submitted that the will itself, taken in its entirety, is perfectly clear in its intention to devise a fee to Henderson in two-thirds of the property, subject to the same "conditions, provisions and charges" as that of the grandsons, and subject to being defeated only if he died without issue *during the lifetime* of the testatrix. There is no need, nor any room, for extrinsic evidence, but if such is received it does not lead to any different construction. Plaintiff, as successor to the interest of Henderson, is the owner of an absolute fee in two-thirds; and the decree of the District Court was entirely correct, except in the particular hereinafter noted.

Cross-Appellant's Opening Brief

ASSIGNMENT OF ERROR

The trial court erred in denying to the plaintiff any right to the present income from the property during the lifetime of Marye Thompson Deady.

ARGUMENT

The trial court held that a trust was created by the stipulation of October 28, 1925 (Defendants' Ex. E, Tr. 307) by which Marye Thompson Deady's suit was settled. This stipulation increased her share of the income above that to which she was entitled under the terms of the will. The trial court held (Tr. 151) that since the present plaintiff was not therein mentioned, he cannot share in the income from the property until the termination of that trust upon the death of Marye.

It is deemed that little discussion is necessary. The trust was purely for the payment of the specified charges—\$150 per month each to Mary and Marye, and \$400 to Henderson—and after the payment of those charges there would seem to be no reason why the balance of the income should not follow the equitable ownership of the property. Henderson is of course no longer drawing a monthly income, and obviously the property is yielding revenue in ex-

cess of the other two charges. Plaintiff has no knowledge of how that money is being applied, but the trust does not direct it to be accumulated, and it is submitted that whatever income is derived over and above the monthly charges should be distributed in the proportion of the equitable ownership—two-thirds to Henderson and one-third to Matthew and Hanover.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,
Appellants,

vs.

RICHARD HOWELL, *Appellee.*

RICHARD HOWELL, *Cross-Appellant,*

vs.

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,
Cross-Appellees.

**APPELLANTS' REPLY BRIEF AND CROSS-
APPELLEES' ANSWERING BRIEF**

Upon Appeals from the District Court of the United States
for the District of Oregon.

HON. JAMES ALGER FEE, *District Judge.*

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for the District of Oregon.
HON. JAMES ALGER FEE, *District Judge.*

Presumption of Meaning of "Death Without Issue"

The basic issue in this case is whether Mrs. Deady, in the Seventh paragraph of her will which provides that "in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds

of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named," intended to provide that the devise over should take effect only in the event of Henderson's death *prior to her own death*, or in the event of Henderson's death without issue *at any time*.

In our original brief (pp. 15-6) we quoted from Mr. Justice Gray's opinion in *Britton vs. Thornton*, 112 U.S. 526, 532-3, as follows :

"When indeed a devise is made to one person in fee, and in case of his death to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age *or without children*, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, *at any time, whether before or after the death of the testator.*" (Italics added.)

We pointed out that the above quotation has twice been quoted with approval by the Supreme Court of Oregon, in *Bilyeu vs. Crouch*, 96 Or. 66, at page 71, 189 P. 222, at page 224; and in *Imbrie vs. Hartrampf*, 100 Or. 589, at page 602, 198 P. 521, at page 525; and also cited with approval in *Shadden vs. Hembree*, 17 Or. 14, at pages 25-6, 18 P. 572, at page 577.

Each of the above three Oregon decisions is discussed in Appellee's Brief (pages 24-6, 29-30, 30-3),

but at no place in that brief, either in the discussion of the Oregon cases or elsewhere, is any notice taken of the Oregon court's repeated approval of the above quotation. In fact, *Britton vs. Thornton* is not even mentioned in the brief.

The Oregon cases are reviewed at some length in Appellee's Brief (23-33), but it is submitted that an utter disregard of the above and other portions of the opinions in those cases, and of the actual holdings therein, is displayed when the brief suggests (p. 34) "that if the question were presented in the Oregon courts today the substitutional rule would be followed." We assert, as we did in our original brief (p. 38), that the Oregon rule is to the contrary. In our original brief (pp. 26-38) we reviewed at length *all* of the Oregon cases which deal with the phrase "die without issue", or words of similar import, and another discussion of them here would be an unjustified repetition. We agree, of course, with appellee that, in the last analysis, the decision of this case depends upon the meaning to be given the language of the will, and, whatever the rule may be, it is but a rule of construction which will yield to a contrary intent derived from the language of the will.

We accordingly proceed to analyze the contentions made by appellee regarding the meaning of the will.

MEANING OF THE WILL

1. (Appellee's Brief, 39, 41, 47) The first contention is that the provision "subject to like conditions, provisions and charges thereon," in the Fourth paragraph containing the devise to the grandsons, means that no subsequent condition in the will can be construed as applicable to Henderson's devise unless "exactly the same" condition is applicable to the grandsons' devise—that the conditions must be "identical". Surely appellee does not mean this. That contention renders the Seventh paragraph entirely nugatory, even though it be construed in accordance with appellee's contentions. Of course, the mere reading of the Third and Fourth paragraphs will demonstrate that by the use of the word "like" in the Fourth paragraph the Testatrix intended simply to state that the devise to the grandsons was "subject to the conditions, provisions and charges thereon *hereinafter made*", the word "like" in the Fourth paragraph taking the place of the phrase "hereinafter made" in the Third paragraph.

Furthermore, in the will under consideration in the case of *Stubbs vs. Abel*, 114 Or. 610, 233 P. 852 (referred to in our original brief at pages 18, 20, 39, and in the appendix, page 85) the fact that the testator gave notice in the Sixth paragraph that he might subsequently limit the devise to Mrs. Stubbs, as well as the devises to Richard and Claire Williams, did not prevent the Oregon Supreme Court from giving full effect to the subsequent limitation

placed on the devises to Richard and Claire only.

2. (Appellee's Brief, 6, 43-4) A contention, not presented to the trial court (See Tr. 12-3, 108-10), is that various provisions in the will involving accumulations, restraints, etc., claimed by appellee to be invalid, are so inextricably bound up with the valid provisions that the elimination of the invalid provisions would entirely frustrate the desires of the testatrix, and therefore that the entire will fails. No authorities are cited in support of their contention that the elimination of types of provisions claimed to be illegal will so defeat the general plan as to render the entire will (except the residuary clause) invalid. The provisions referred to are concerned with accumulations and restraints and are not provisions whereby the vesting of title is illegally postponed. The present case presents no situation calling for the application of the rule of law stated by appellee. See *Closset vs. Burtchall*, 112 Or. 585, 230 P. 554; *Friswold vs. United States National Bank*, 122 Or. 246, 257 P. 818.

3. (Appellee's Brief, 44-6) Naturally the testatrix desired her devisees to have power of alienation after 25 years, but the power of alienation which she desired them to have was only of the estates *actually devised*.

The suggestion on page 45 that if Henderson's title was defeasible "his mortgage" would be unacceptable, is entirely beside the point. Naturally, if the existing mortgage was extended it would be by an extension agreement executed by Henderson,

Hanover, and Matthew, and their respective wives.

4. (Appellee's Brief, 46) The suggestion that testatrix had "little regard" for the rule against perpetuities and related rules of law, and therefore probably wished the expression "death without issue" to have its "settled common law meaning", is, we submit, utterly illogical. If the draftsman of the will violated the rule against perpetuities and "related rules of law", it is more logical to believe that such violation resulted from an ignorance of those rules and that accordingly he also was ignorant of what appellee refers to as "the settled common law meaning" of the expression "death without issue".

5. (Appellee's Brief, 48) The astounding suggestion is made that because Mrs. Deady did not desire the devise to the grandsons to be cut down upon the death of Henderson, therefore she did not desire the devise to Henderson to be cut down upon his own death!

6. (Appellee's Brief, 49-52) In answer to our contention that if the Seventh paragraph be construed as a substitutional devise only it was entirely unnecessary because, if Henderson had predeceased Mrs. Deady, Matthew and Hanover would have taken by intestacy the property devised to Henderson, appellee makes a rather extended and curious argument.

It is first pointed out that (in the absence of the Seventh paragraph) the descent to Hanover and Matthew, in the event Henderson predeceased his mother, would have been from Mrs. Deady and not

from Henderson. We, of course, agree, and, in making our contention (Appellants' Br., 47), we intended to imply nothing to the contrary. It is then pointed out that one of the outstanding features of the will is the "elaborate structure of legacies and restrictions"—provisions for income for daughters-in-law, grandsons, and Henderson, charges against income for inheritance taxes, sinking fund to retire the mortgage, restraint on alienations, etc.—all for the purpose of "keeping the property itself intact, and providing for the family out of the income alone." The contention is then made that if Matthew and Hanover had inherited the two-thirds interest upon a lapse resulting from Henderson's death prior to that of Mrs. Deady, the two-thirds interest would have been free from these charges, provisions, and restraints. And, as the argument goes, there would then have been a frustration of Mrs. Deady's primary desire to keep the property intact "for the family". In addition to the obvious answer that any intent by Mrs. Deady to give this two-thirds interest to Henderson's widow and Henderson's widow's son by another marriage—strangers to Mrs. Deady—can hardly be said to be "keeping the property itself intact, and providing for the family out of the income", we have four answers to the above contention:

First: Had the Seventh paragraph been omitted and had Henderson predeceased Mrs. Deady so that the two-thirds interest would have gone to Matthew and Hanover by intestacy, the dire result which

appellee claims Mrs. Deady foresaw and guarded against would not have taken place anyway. The provisions of the Fifth paragraph for the payment of income from this property are not (as appellee's counsel assume) in any way dependent upon the preceding devises in the Third and Fourth paragraphs. Had all the preceding devises lapsed, the Fifth paragraph would still have remained in full force and effect. A mere reading of that Fifth paragraph discloses that appellee is mistaken in this contention. And while it may be true that the purported "express condition" against alienation in the Sixth paragraph would not have been effective with respect to that two-thirds interest in case of intestacy, it is also clear that the insertion of the Seventh paragraph does not change that result. The condition in the Sixth paragraph reads ". . . the devises contained in *items three and four hereof*, are upon the express condition . . ." And so, the devise contained in the Seventh paragraph—whether substitutional or anything else—is not made subject to the condition provided in the Sixth paragraph.

Second: If the Seventh paragraph was inserted (as appellee claims) solely for the purpose of making certain that all interests in the property would be subject to these charges and restraints, even in the event of Henderson's predeceasing Mrs. Deady, why then did not Mrs. Deady make a similar provision for the contingency of Hanover's or Matthew's predeceasing her? Exactly the same argument which appellee makes would then be applicable. If some

such provision was necessary in order to insure that the conditions, provisions and charges would apply to Henderson's two-thirds, if he predeceased her, a similar provision was equally necessary in order to insure that they would apply to Matthew's and Hanover's one-third, if they predeceased her.

Third: If Mrs. Deady thought that some safeguard was necessary to perpetuate the conditions, provisions and charges, and inserted the Seventh paragraph only for that purpose (as appellee claims), she certainly chose a most indirect, artificial and unnatural method to accomplish her desired result. Certainly the device and language employed were not such as are reasonably to be expected either of a layman or a lawyer desiring simply to provide that the conditions, provisions and charges should not be affected by any devolution of the title.

Fourth: If some safeguard was necessary to prevent a lapsed devise, it should be noted that the lapsed devise would be prevented just as surely by the construction which we place upon the Seventh paragraph as by the construction which appellee gives it. For we do not contend that the devise over to the grandsons under the Seventh paragraph would take place *only* in the event that Henderson died after the death of Mrs. Deady. We contend that the devise over would have become effective upon Henderson's death "at any time" without issue—either before or after the death of Mrs. Deady. We believe, however, that in inserting the Seventh para-

graph, Mrs. Deady actually had in mind Henderson's death after her own.

7. (Appellee's Brief, 52-60) In our original brief (pp. 42-4), we pointed out that the Eighth paragraph of the will which permitted Henderson to bequeath to his widow, if he left one, the income which he would have received from the property if living, clearly demonstrates that Mrs. Deady did not intend to give Henderson an absolute indefeasible fee in the property, since otherwise the Eighth paragraph would have been entirely unnecessary; and we also suggested (pp. 65-6) that the exercise of this power of appointment by Henderson in his will was a recognition by him that he did not have an indefeasible fee in the property. Appellee's arguments on these points will now be considered.

(a) First it is argued (Appellee's Brief, 53) that even though Henderson held an indefeasible fee, the provisions against alienation, if valid, prevented him from devising that fee to his widow. It is then argued that the power of appointment was "obviously" to enable Henderson to give his widow the income if he died during the 25-year period that the restraint on alienation was to be effective.

In the first place, we very much doubt whether the provision in the Sixth paragraph that this property "shall neither be mortgaged, partitioned, sold, or otherwise encumbered", even when coupled with the later general terms "shall not be disposed of or encumbered", can be construed as forbidding a devise by will. But regardless of this, certainly it

would not be contended that the mere descent of property in case of an intestate death is a violation of such a restraint on alienation (see *Kalyton vs. Kalyton*, 45 Or. 116, page 129, 74 P. 491, 78 P. 332; *Burbank vs. Rockingham Insurance Co.*, 24 N. H. 550, page 558, 57 Am. Dec. 300). Counsel have entirely overlooked the fact that under Oregon law a widow inherits all real property when her husband dies without issue (O.C.L.A., Section 16-101). Nor have they explained away the final sentence of the Eighth paragraph of Mrs. Deady's will: "Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady."

Shortly after having asserted that the above was "obviously" the purpose of the Eighth paragraph, it is inconsistently argued (Appellee's Brief, 55) that the power of appointment, if intended to be exercised *after* Mrs. Deady's death, was entirely void for remoteness. As we understand the reasoning, it is that at some remote date in the future Henderson might have married a woman who was not alive at the time of Mrs. Deady's death. It is also said that the charge in the widow's favor might "run for a period greater than 21 years after lives in being at Lucy's death." And since inferences as to Mrs. Deady's intentions have weight only when the suggested possibilities can be said to have occurred to Mrs. Deady, it is stated by appellee that the above possibility is "expressly recognized" by the parenthetical clause "if he then has a wife" in the Eighth paragraph. Without pursuing the matter

through all its ramifications, we merely state that (1) the right of Henderson's widow to the income under the power of appointment would necessarily vest, if at all, immediately upon his death, which was within the time required by the rule against perpetuities; (2) the rule against perpetuities is concerned with the vesting of interests and not with the continuation thereof; and (3) if counsel's argument is sound, then *all* general powers of appointment to be exercised by will are void since in every case the donee of such a power may exercise it in favor of persons not born until more than 21 years after the death of the donor of the power.

(b) In spite of the contention just discussed (that if the power of appointment was to be exercised only after Mrs. Deady's death, it was void), it is urged (Appellee's Brief, 54, 60) that even though (as appellee contends) the Sixth paragraph—"die without issue"—refers to Henderson's death prior to his mother's death, the Eighth paragraph providing for the power of appointment could refer to the death of Henderson *after* the death of Mrs. Deady. We submit that when these two paragraphs are read together, and their relative positions in the will and the purposes of each are considered, it becomes very clear that Mrs. Deady intended the Eighth to be a modification of the Seventh, and therefore that she was not referring to the possibility of Henderson's death *prior* to her own in one paragraph and to its possibility *after* her death in the other paragraph. In both cases she was refer-

ring to his death after her own death.

(c) In spite of the assertion in Appellee's Brief (p. 55) discussed above, that Mrs. Deady recognized (by the words "if he then has a wife") that the power of appointment in the Eighth paragraph might be exercised at some remote time in the future, the brief proceeds to argue (pp. 55-60) that if the power of appointment had been exercised prior to Mrs. Deady's death (and therefore prior to the effective date of her will) such an exercise of the power would have been valid. It is apparent that appellee's counsel recognize that such a contention is absolutely essential to their case.

Aside from the language in the Eighth paragraph indicating that that paragraph, like the remainder of the will, spoke only from the date of Mrs. Deady's death (being in accord with the legal presumption in that respect; see our original brief, p. 22) appellee is met with the insuperable obstacle that a power of appointment cannot be exercised until the power comes into being. We pointed this out in our original brief (pp. 21-2, 43); but appellee's counsel refuse to concede that a power of appointment given in a will cannot be exercised prior to the death of the maker's will. They refer to authorities (pp. 56-7) which support them not at all, but hold merely that a power may be exercised by a will *executed* prior to the creation of a power, or "by a will of *prior date*". The question here is not whether Henderson could have exercised the power by a will *executed* by him prior to his mother's

death. The question is whether he could have exercised the power if he *had died* before her death. The cases cited by appellee (pp. 56-7), together with other cases, are cited in 1 Scott on Trusts, Section 54.4, where the learned author makes the obvious explanation:

“In all these cases there is no difficulty since the donor of the power predeceased the donee.”

But, counsel insist (pp. 57-60), the same result may be reached by the application of “the doctrine of *incorporation by reference*”—by which we understand them to mean that Mrs. Deady in the Eighth paragraph intended to incorporate, by reference, the provisions of her son’s will, not yet executed. Counsel have entirely disregarded the well established rule that incorporation by reference can only take place when the document incorporated is already in existence and is specifically described. *Gerrish vs. Gerrish*, 8 Or. 351; *Bochmer vs. Silvestone*, 95 Or. 154, 172, 186 P. 26; *Witham vs. Witham*, 156 Or. 59, 65, 66 P. (2d) 281, 110 A.L.R. 253, 257; Atkinson Law of Wills, 332, 335; Jarman on Wills, 7th Ed., 124; Page on Wills, 2nd Ed., Sections 248-51; Schouler, Wills, Executors, and Administrators, 6th Ed., Sections 400-7; Thompson on Wills, 2nd Ed., 137, 138.

Nor does the New York case of *In re Fowles’ Will*, 222 N.Y. 222, 118 N.E. 611, quoted on pages 58-9 of appellee’s brief, in any way aid appellee’s contention as to incorporation by reference, as a

mere reading of the quoted portion will disclose. There a husband had granted to his wife a power of appointment. He provided that in the event he and his wife should die in a common disaster he should be deemed to have predeceased his wife. The question was whether the latter provision was valid, and the court held it was.

No amount of argument can, we submit, overcome the obvious fact that the Eighth paragraph of the will conclusively demonstrates that the death of Henderson referred to in the Seventh paragraph had reference to his death subsequent to Mrs. Deady's death, or more probably to his death "at any time"—if indeed a mere reading of the Seventh paragraph itself is not alone sufficient to show her clear intention to that effect.

(d) Appellee also contends that the fact that Henderson later exercised the power by his will is "of no great aid to defendants."

We believe that what we have said above and in our original brief sufficiently demonstrates that Henderson's exercise of the power was the solemn recognition by him that Charlotte would otherwise receive nothing from the property. But counsel argue (p. 54) that even though the restraint on alienation "was not legally binding on him", he apparently recognized it "as a moral obligation". But it must not be forgotten that plaintiff contends (Tr. 10, 11), and defendants admit (Tr. 66), that if Henderson had an indefeasible absolute fee in the property, that fee was devised to Charlotte *by Henderson in*

the very will which contained the exercise of the power of appointment and in which counsel now contend Henderson “apparently recognized” the restraint on alienation as “a moral obligation”. True, it was devised by the general residuary clause, but if (as appellee now contends) Henderson both (1) believed he had an absolute fee simple title and (2) recognized and endeavored to abide by a moral obligation not to devise it, he surely would have avoided doing so even by general words. But, of course, if he had such a title, neither the provision giving Charlotte the income for life, nor the general devise was necessary to give Charlotte either the income or the fee simple title since without them Charlotte would have obtained both as the statutory heir of Henderson.

8. (Appellee’s Brief, 61, 62) It is next contended (page 61) that the fact that Henderson is given two-thirds of the residue, and (as appellee contends) was “the chief object of the testatrix’ bounty” (p. 62) indicates that she intended Henderson to have an absolute and indefeasible fee in Lot 1, Block 212. In our original brief (pp. 52-3) we commented upon a similar argument advanced by the trial court; but when appellee concedes, as he must and does, that Mrs. Deady believed she had effectively provided that the property could not be encumbered or alienated but had to be kept “for the family”, appellee answers his own argument. For then the question becomes not whether Henderson was a chief object of his mother’s bounty, but whether

some future wife and widow of Henderson and that widow's son—strangers to Mrs. Deady—were chief objects of Mrs. Deady's bounty. And when it is recalled that at the time of the execution of Mrs. Deady's will, Henderson was living apart from his wife Amalie, and desired a divorce, and planned to marry Charlotte, and that this conduct and this desire and this plan all met with the disapproval of Mrs. Deady (Tr. 267-9), need more be said?

9. (Appellee's Brief, p. 61) It is contended that the fact that Mrs. Deady named Henderson and Joseph Simon as co-executors indicates she had in mind the contingency of Henderson not surviving her. This argument presupposes that she really preferred Henderson as her executor to Joseph Simon and that she added the latter to care for the contingency of Henderson's death. The converse argument, we submit, is just as logical; but in any event the members of this court will doubtless agree that the usual and appropriate provision to take care of the contingency suggested by appellee is to name not co-executors but alternate executors. The draftsman of the will apparently understood this, for he named the Bank as *alternate* executor and trustee in the event of the "death, resignation, or disqualification" of both the executors and trustees.

In fact, as we pointed out in our original brief (p. 47), the authorities declare that by naming Henderson as an executor, Mrs. Deady indicated that the provision for the gift over upon his death had reference to his death subsequent to her death.

CONCLUSION

Much stress has been given both by the learned trial judge (Tr. 41, 58-9, 114, 454-5) and by learned counsel for appellee (Br. 51-5, 62-3) to the comprehensive plan set forth by Mrs. Deady in her will to keep this property intact, free from encumbrances and immune from alienation. We likewise stress that plan. Both the learned trial judge (Tr. 120, 454-5; see also appellants' brief, 54) and appellee's counsel (Br. 62) advert to the fact that the primary purpose of this comprehensive plan was better to provide "for the family"—the trial judge (Tr. 120) recognizing also a purpose "to have the property kept intact as a monument to Judge Deady".

On one important point, however, there is a sharp divergence between appellee's brief and the opinions of the learned trial judge. The learned trial judge recognized that if Mrs. Deady's intention, as disclosed by her will, could be given effect, Hanover and Matthew should now be declared the owners of this property and plaintiff the owner of no part thereof, but he felt that some rule of law prevented him from carrying out his intention (Tr. 47-60, 120, 454-5; see appellants' brief 53-4, 68-70, 73-4). Appellee's brief simply denies that such was Mrs. Deady's intention. It does not contend (aside from the argument regarding the result of the alleged illegal restraints and provisions for accumulations) that if such intention should be found there is any rule of law to prevent a court from carrying that intention into effect.

The appellee has advanced no good reason (except that he wants the property) why this Court should hold that Mrs. Deady, in the Seventh paragraph of her will, was referring only to Henderson's death prior to her own death.

The Supreme Court of the United States in *Britton vs. Thornton*, *supra*, 112 U.S. 526, has held that the natural and literal meaning of the words used by Mrs. Deady is death at any time, whether before or after the death of the Testator. This has been cited with approval once and quoted with approval twice by the Oregon Supreme Court, the last quotation being in *Imbrie vs. Hartrampf*, the last occasion on which the Oregon court had the matter before it for consideration.

Taking the will by its "four corners" this interpretation is strengthened by the notification given at the outset of the Third paragraph of Mrs. Deady's will that Henderson's devise was "subject to the conditions, provisions and charges thereon hereinafter made", and by the provision of the Eighth paragraph of the will giving Henderson a power of appointment by his will to his wife of the income from two-thirds of the property for her lifetime, which power would not only have been unnecessary had she intended Henderson to have an absolute fee simple interest in the property if he survived her, but it would have been entirely ineffectual had he predeceased her.

Henderson Deady himself construed the will to give him only a defeasible fee which would be de-

feated upon his death without issue, because he so represented to Hanover Deady on several occasions; implemented this interpretation by giving Hanover an affidavit (Ex. H, Tr. 322) that he had no children at that time who would prevent him from dying without issue (Tr. 316); and represented to his wife's lawyer (after consultations with his own lawyer) that he had only a power of appointment under his mother's will (Tr. 225, 226).

In Henderson's own will, executed more than nine years after his mother's death (Ex. 1, Tr. 199), Henderson expressly referred to the power of appointment, and he exercised it in favor of his wife, Charlotte, making no mention of any other interest in Lot 1, Block 212.

The executor of Henderson's will, both in the Petition for Probate (Ex. A, Tr. 208) and, two years later, in the Inventory and Appraisement (Ex. B, Tr. 214), he being represented on both occasions by Robert F. Maguire (counsel for appellee in this case) as legal counsel, swore that the only assets of the Estate consisted of two lots in Mountainview Park, Portland, having a value of \$100.00.

And so we say that appellee has given no valid reason why the will of Lucy A. H. Deady should not be construed in the manner in which it reads, in the manner in which the evidence shows she intended it, and in the manner in which Henderson Deady, through whom appellee is claiming, construed the will during the ten years in which he survived his mother and in his own will left upon his death.

CROSS-APPELLEES' ANSWERING BRIEF

The cross-appellant urges that the trial court erred in denying to him any right to the present income from Lot 1, Block 212, City of Portland, during the lifetime of Marye Thompson Deady, the court having held that a trust was created by the stipulation of October 28, 1925, executed by the executors and beneficiaries under the will of Lucy A. H. Deady (Defendant's Ex. E, Tr. 307). It is somewhat difficult for us to argue this question, because we do not agree with the trial court that the stipulation (which settled the suit brought by Marye) *created* a trust, but say rather that it *recognized the existence* of a trust which had already been created by the will of Lucy A. H. Deady, and simply modified some of its terms by (among other changes) increasing the monthly benefits to Marye and extending them for the remainder of her life, instead of, as provided in the will, until she remarried.

If it did create a trust, however, the cross-appellant was not a party to the stipulation and there is no provision in the stipulation giving to him any income from the trust. He is therefore not entitled to any of the income from the property during the duration of the trust.

In any event it is clear that he is entitled to none of the income which may heretofore have accrued, nor to any which may be realized as long as the estate of Henderson is open. This emphasizes our contention that Henderson's executor is a necessary party to this case.

Respectfully submitted,

SIMON, GEARIN, HUMPHREYS & FREED,

EDGAR FREED,

CAKE, JAUREGUY & TOOZE,

NICHOLAS JAUREGUY,

Attorneys for Appellants and
Cross-Appellees.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,

vs. Appellants,

RICHARD HOWELL, Appellee.

RICHARD HOWELL, Cross-Appellant,
vs.

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,
Cross-Appellees.

Cross-Appellant's Reply Brief

Upon Appeals from the District Court of the United States
for the District of Oregon.

HON. JAMES ALGER FEE, District Judge

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
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Appellants,

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Appellee.

RICHARD HOWELL,

vs.

Cross-Appellant.

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,

Cross-Appellees.

Cross-Appellant's Reply Brief

Upon Appeals from the District Court of the United States
for the District of Oregon.

HON. JAMES ALGER FEE, District Judge

**Plaintiff Is Entitled to Two-thirds of the Present Income
From the Property, After Payment of the Charges.**

For the purposes of the cross-appeal, we assume that the trial court's holding was correct as to the meaning of the will, and that under it Henderson took a fee interest in two-thirds of the property, subject to being defeated only if he died without issue

prior to the death of the testatrix. Since he survived the testatrix he took an absolute fee upon her death which passed by successive devises to his widow, Charlotte, and to her son, Richard Howell, the present plaintiff.

In spite of the trial court's holding that the plaintiff was the owner of two-thirds in fee, however, it denied him the right to any of the present income from the property until the death of Marye Thompson Deady. This result supposedly followed from the stipulation of October 28, 1935, (Deft's. Ex. E, Tr. 307) which settled the suit of Marye Thompson Deady whereby she sought to impress a trust upon one-third of the property in her favor.

That stipulation, after reciting the compromise and settlement of Marye's suit, merely provided for certain monthly payments from the income of the property, in lieu of certain payments provided for in Lucy's will. Under the stipulation, Marye Thompson Deady was to receive \$150 per month for life, instead of \$75 as provided in the will; Henderson was to receive \$400 per month, as formerly provided in the stipulation of October,, 1942 (Deft's. Ex. Ex. J., Tr. 281), "or such other sum per month during the administration of the estate of said Lucy A. H. Deady in the discretion of the executors as they may deem proper *and until he shall become entitled to the full distribution provided for in said will*" (italics ours); and all other payments of income were to remain as provided in the will—namely, \$150 per month to Mary E. Deady for life and \$100

each per month to Matthew and Hanover. The only real change was the increase of Marye's share.

The stipulation then authorized the "executors and the trustees and managers of said property and their successor or successors, whether named in the will or otherwise appointed" to make the payment to Marye; directed them to defer the creation of the sinking fund (invalid anyway) until after the death of Mary, Marye or Henderson; and waived all claims against the executors, etc., arising out of the changes made by the stipulation.

It then provided that Marye should make, execute and deliver to Henderson, Matthew and Hanover "*in proportion to their interests*" a special warranty deed to the property, subject to the terms of the stipulation and to the payment to her of the agreed amount. Then—and this is apparently the clause on which the trial court based its decision—the stipulation provided as follows: (Tr. 310)

"And said lot shall be impressed with and be held in trust and remain in the possession of the trustees and the income from said property shall be collected and distributed by the trustees and said property shall be and remain charged with the payment of said \$150. per month to said Marye T. Dedy during the remainder of her natural life."

We agree with counsel for defendants when they say that this stipulation did not create a trust—but for a different reason. They assert that it but *recognized a pre-existing trust*, while we contend that a

true trust did not exist at all—either under the will or under the stipulation.

It was pointed out in our former brief (p. 64), and held by the trial court (Tr. 150), that under the will legal title did not at any time pass to the executors or “trustees”, as such, but vested immediately in the beneficial owners— $\frac{2}{3}$ in Henderson and $\frac{1}{6}$ each in Matthew and Hanover. The powers and duties of the executors were merely those pertaining to the administration of the estate—the collection of the income necessary to the payment of specific legacies. As stated by the trial court (Tr. 150), “the power to renew the mortgage is given to the fee owners, and the restriction against alienation is placed directly against them, not against the executors.”

Before there can be a trust, the legal title must be vested in the one alleged to hold as trustee.

“A trust is created only where the title to property is held by one person for the benefit of another.”

Scott on Trusts, p. 36, Sec. 2.6.

It could hardly be contended that this stipulation itself operated as a conveyance of legal title to the alleged “trustees”, especially in view of the provision that Marye is to execute a special warranty deed to Henderson, Matthew and Hanover in proportion to their interests—not to the alleged “trustees”.

In our view the situation created—or continued—by this instrument was not a trust, but rather *an equitable charge*, under which the devisees, Matthew, Hanover and Henderson (the latter now replaced by

the plaintiff, Richard Howell) took the legal title in their respective proportions, subject only to a *security interest* in favor of each of the persons named therein, to enforce the monthly payments. The distinction between a charge and a trust has been well pointed out by a leading authority:

“Sec. 10. *Trust and equitable charge.* If a testator devises or bequeaths property subject to the payment of certain sums of money to third persons, he thereby creates *an equitable charge, not a trust*. An equitable charge is like a trust in that in each case the legal title to property is vested in one person and an equitable interest in the property is given to another. The interest which the equitable encumbrancer has, however, is different from the interest of a beneficiary of a trust. The equitable encumbrancer has only a security interest in the property; the beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property. If a devisee subject to an equitable charge fails to pay the equitable encumbrancer the sum to which he is entitled, the latter’s remedy is a suit in equity to obtain a decree for the sale of the land to pay the charge; if a trustee fails to perform his duties under the trust, the remedy of the beneficiary is a suit in equity to compel specific performance or redress of the breach of trust. The duty of a devisee subject to an equitable charge with respect to the property is a negative one; he must not so deal with the property as to destroy or interfere with the equitable lien of the encumbrancer, as for example by transferring it to a purchaser for value and without notice of the charge.

“If property is transferred in trust for a particular purpose and the purpose is fully accom-

plished without exhausting the trust property, the trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for the settlor or his estate, unless by the terms of the trust the settlor manifests an intention that the trustee in such case should keep the property. In the case of an equitable charge, on the other hand, if the amount of the charge is paid, the person who holds subject to the charge can keep the property for his own benefit.” (Scott on Trusts, p. 71-2)

“Sec. 10.4. *Character of relation.* An equitable charge, unlike a trust, does not involve a fiduciary relation. A person who takes property subject to an equitable charge is not in a fiduciary relation to the equitable encumbrancer; he simply holds the property subject to the security interest of the other.” (Scott on Trusts, p. 76)

“Sec. 10.6. *Intention to create charge or trust.* Whether an equitable charge or a trust is created depends upon the manifestation of intention of the transferor. If the intention is to impose a duty upon the transferee to deal with the property for the benefit of a third person and to give the third person the beneficial interest in the property, a trust is created; if the intention is to give the beneficial interest to the transferee and merely to give a security interest to the third person, an equitable charge is created. If a testator devises land and directs the devisee to sell the land and to pay the proceeds or a part of the proceeds to a third person, a trust is created. On the other hand, if the testator devises land ‘subject to the payment of’ a certain sum to a third person, or ‘he paying’ a certain sum to a third person, an equitable charge and not a trust is created. So also if land is devised to a person ‘on

condition that he pay' a certain sum to a third person, ordinarily *an equitable charge and not a trust* or condition is created." (Scott on Trusts, p. 77)

The present situation is exactly that described by the above author as constituting a charge, rather than a trust; and indeed the will itself recites "*Subject to the conditions, provisions and charges*", obviously referring to the monthly payments; and the stipulation provides that the property "shall be and remain *charged* with the payment." The stipulation merely modified the charge which the will created.

Viewed in that light—as it must be, we conceive—there can be no question but that the plaintiff is entitled to his proportionate share of the income after the charges are paid. He is the holder of legal title, as well as the principal beneficial interest; and when the charges are fully satisfied, where else could the income go? Surely not to the First National Bank, for its own use, and there is no direction that it be accumulated! The charge is merely a lien for security, and as each of the payments is made, the purpose of the security is fulfilled, freeing the balance of the income to follow the ownership of the property.

As a matter of fact, however, even if the stipulation did create a trust, as the trial court seemed to think, the same result would follow. As stated by Scott in the passage quoted above:

"If property is transferred in trust for a particular purpose and *the purpose is fully accom-*

plished without exhausting the trust property, the trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for the settlor or his estate, unless by the terms of the trust the settlor manifests an intention that the trustee in such case should keep the property.” (Scott on Trusts, p. 72)

Even if the bank were now a true trustee, it would have no authority to *retain* the balance of the income after making the monthly payments, but the surplus would revert *to the estate*, and under paragraph nine of the will would “follow the title and ownership of said real property”, two-thirds to Henderson (now replaced by Richard Howell, the plaintiff) and one-third to Matthew and Hanover. From another angle, the trust would fail for want of a beneficiary for the unexpended balance of the income—if there were a trust in the first place.

The mere fact that Richard Howell is not named personally in the stipulation is of no significance, for he succeeded to whatever interest Henderson had in the property. If Henderson had complete ownership, subject only to a security interest to enforce the payments, then Richard Howell takes the same estate. If there was a trust, and Henderson was entitled to a share of the income, which was not required for trust purposes, then Richard Howell has the same interest in the income.

In summary, then, if title to the property passed directly to the devisees, subject only to an equitable charge to secure the monthly payments—as we deem

the true situation to have been—then it is clear that the holder of title is entitled to any surplus remaining after payment of the charge.

On the other hand, if a trust was created for the payment of these amounts, either under the will or under the stipulation, and the purposes of the trust do not absorb the entire income from the property, then the balance reverts to the estate and descends to the beneficial owners in their proportionate shares. In the absence of a specific direction, in the trust instrument, a trustee certainly has no authority to retain and accumulate the income from the trust property.

In either event, the plaintiff, as the owner of $\frac{2}{3}$ in fee, is entitled to that proportion of the income, after payment of the charges; and the trial court's denial of his right to the income was wholly inconsistent with its holding as to the devolution of the fee.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON & BIGGS,

ROBERT F. MAGUIRE,

RANDALL B. KESTER,

JOHN SCOBLE,

Attorneys for Cross-Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

Transcript of Record

Upon Appeal from the District Court for the
Territory of Alaska, Division Number One

FILED

JUL 25 1942

PAUL P. O'BRIEN,
CLERK

NO. 10147

United States
Circuit Court of Appeals
For the Ninth Circuit.

CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

Transcript of Record

Upon Appeal from the District Court for the
Territory of Alaska, Division Number One

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 4816-A

CASH COLE,

Plaintiff,

vs.

WALLIS GEORGE,

Defendant.

AMENDED COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges.

I.

That during all the times herein mentioned The Baranof Hotel Inc., was and still is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, for the purpose of carrying on and conducting a hotel business.

II.

That during all the times herein mentioned said corporation had its principal office for the transaction of business in the City of Juneau, Alaska.

III.

That the plaintiff was during all the times herein mentioned, and still is, a stockholder of, and in, said corporation; and that the defendant knew that plaintiff was a stockholder in said Baranof Corporation.

IV.

That during said year of 1940, aforesaid, the said corporation was engaged in its said business of conducting a hotel, and during said year did employ large numbers of employees in the carrying on and furtherance of said business, and did during said year incur certain liabilities, and received and disbursed divers sums of money. [1*]

V.

That the defendant, Wallis George, was during the whole of the year 1940, and still is, the secretary and treasurer of the Baranof Hotel, Inc., a corporation incorporated under and by virtue of the laws of Alaska.

VI.

That Section 923 of the Compiled Laws of Alaska of 1933 as amended by Section 923 of the Session Laws of Alaska of 1935, provides that every corporation formed by virtue of the laws of Alaska, shall annually, within sixty days from the first day of January of each year, file with the Auditor of the Territory of Alaska and with the clerk of the District Court in each Division, wherein business of the corporation is conducted, a report made and verified by the president and the treasurer and shall keep a copy of said report at its main office for inspection of stockholders which shall state:

*Page numbering appearing at foot of page of original certified Transcript of Record.

1. The amount of its capital stock and the amount actually issued.
2. The amount of its debts.
3. The amount of its assets.
4. The names and addresses of all the directors and officers of the corporation.

That any corporation organized under the laws of the Territory of Alaska whose fiscal year ends at any other time than the end of the calendar year, shall be allowed sixty days from the date on which its fiscal year ends within which to file said report.

That if any report be not made and filed as prescribed in this section, either of such officers who shall thereafter refuse or neglect to make and file such reports within 10 days after written request to do so shall have been made by a creditor or a stockholder of the corporation, shall be under a penalty of \$50.00 recoverable by such aggrieved creditor or stockholder, for every day he or they shall so neglect or refuse. [2]

VII.

That the fiscal year of said Baranof Hotel Corporation ends on the 31st day of March of each year; that it was the duty of the said Baranof Hotel Corporation, Inc., to make and file said report at a date not later than June 1st, 1940; that said corporation neglected to make and file a report, made and verified by its president and treasurer, within

the time provided by the statute, to-wit, within sixty days from March 31, 1940.

That following said corporations failure to file said report, a written request was made upon the treasurer of said corporation, Wallis George, to make and file a report as provided by statute 923 of the Session Laws of Alaska of 1935.

That said treasurer, Wallis George, neglected and failed and refuses to file said annual report, as provided by statute.

VIII.

That on the 17th day of November, 1941, this plaintiff, as a stockholder, made a written request of the defendant, Wallis George, treasurer of said corporation, that such duty be performed, to-wit, file said annual report, as required by law, of the said Baranof Hotel Corporation; that said defendant, Wallis George, as hereinbefore alleged, failed, refused and neglected to make or cause to be made said annual report and file the same with the Auditor of the Territory of Alaska and the clerk of the District Court for the first division; that at the date of the filing of the first complaint on behalf of the plaintiff, sixty-three (63) days had expired since plaintiff, Cash Cole made said written request herein above referred to, to-wit from the 17th day of November, 1941 to January 19th, 1942.

IX.

That by reason of the premises the defendant for-

feited and became indebted to the plaintiff in the sum of Thirty-one [3] Hundred and Fifty (\$3,150.00) Dollars, whereby an action accrued to this plaintiff in accordance with section 923 of the Session Laws of Alaska of 1935.

X.

That the amount which the defendant will forfeit and become indebted to this plaintiff by his continuing neglect to file said verified report is not now possible to ascertain.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$3,150.00 for costs of suit, and for such other and further relief as to the court may seem proper; plaintiff also prays for the right to file a supplemental and amended complaint at the time of the trial of this action to include further amounts that the said defendant may forfeit and become indebted to this plaintiff in accordance with section 923 of the Session Laws of Alaska of the year of 1935.

HAROLD H. BATES

Attorney for Plaintiff.

(Duly verified.)

Service accepted and copy received this 28th day of March, 1942.

HOWARD D. STABLER,

Attorney for Defendant.

[Endorsed]: Filed March 28, 1942. [4]

[Title of District Court and Cause.]

DEMURRER

Comes now the above named defendant, by Howard D. Stabler his attorney, and demurs to the plaintiff's amended complaint on the ground and for the reason that:

1. There is a defect in non-joinder of necessary party defendants; and
2. The amended complaint fails to state facts sufficient to constitute a cause of action against the defendant Wallis George.

Dated: Juneau, Alaska, April 3rd, 1942.

HOWARD D. STABLER

Defendant's Attorney.

Copy Received 4/4/42. Harold H. Bates.

[Endorsed]: Filed April 4, 1942. [5]

[Title of District Court and Cause.]

ORDER SUSTAINING DEMURRER TO
PLAINTIFF'S AMENDED COMPLAINT

On April 4th, 1942, this matter came before the court on the defendant's demurrer to the plaintiff's amended complaint; attorney Howard D. Stabler appearing for the defendant, and attorney Harold H. Bates appearing for the plaintiff. Argument was had, and the matter was submitted to the court for decision,—

Now, therefore, the law and the premises being fully understood and considered by the court, it is Ordered that the defendant's demurrer be, and same hereby is, sustained on the second ground; denied first ground. Exception allowed to the plaintiff and defendant. April 8, 1942.

GEO. F. ALEXANDER

District Judge.

O.K. H. Bates.

[Endorsed]: Filed and Entered Apr. 8, 1942. [6]

[Title of District Court and Cause.]

OPINION

The plaintiff in this case seeks to recover from the defendant as treasurer of the Baranof Hotel, Inc., an Alaska Corporation, the penalty provided by Section 923, C.L.A. as amended by Chapter 89, Session Laws of Alaska, 1935, for failure to make and file the annual report of such corporation as required by law.

The defendant has demurred to plaintiff's complaint on two grounds, viz:

First: That there is a defect in non-joinder of necessary parties defendant;

Second: That the complaint does not state facts sufficient to constitute a cause of action against the defendant Wallis George.

The complaint *state* in substance that the Baranof

Hotel, Inc. is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, having its principal place of business at Juneau, Alaska. That the plaintiff is a stockholder of said corporation. That the defendant, Wallis George, is the secretary and treasurer of said corporation. That under Sec. 923, C.L.A. as amended by Chapter 89, Session Laws of Alaska, 1935, it became and was the duty of the defendant Wallis George, as treasurer of said corporation, to file with the Auditor of the Territory of Alaska and with the Clerk of the District Court in the First Division, the annual report of [7] said Baranof Hotel, Inc., made and verified by its president and treasurer, stating the amount of its capital stock and the amount actually issued; the amount of its debts; the amount of its assets, the name and address of all the directors and officers of the corporation, within sixty days from the date of its fiscal year ends. That the defendant has failed and neglected to file such report, after a written request was made on him so to do by the plaintiff as a stockholder of said corporation, as a result of which defendant became liable to the plaintiff for the penalty provided by said section.

Sec. 923 of the statute requires,—

“Every corporation formed under this article shall annually, within sixty days from the first day of January of each year, file with the Auditor of the Territory of Alaska and with the Clerk of the District Court in each division

wherein business of the corporation is conducted, a report made and verified by the president and treasurer.”

The statute then provides:

“If any report be not made and filed as prescribed in this section (923), either of such officers who shall thereafter refuse, or neglect to make and file such report within ten days after a written request to do so shall have been made by a creditor or a stockholder of the corporation, shall be under penalty of Fifty Dollars, recoverable by such aggrieved creditor or stockholder, for every day he or they shall so neglect or refuse.”

It is thus made the duty of the corporation itself, in the first instance, to make and file an annual report, made and verified by its “president and treasurer” within sixty days from the first day of January of each year, or within sixty days from the date on which its fiscal year ends. If it fails to do so any stockholder or creditor may make a demand upon the president and treasurer to file such report, and if they fail to make and file such verified report within ten days after a written request to do so, the statute makes them liable to any aggrieved creditor or stockholder for a penalty of Fifty Dollars per day, [8] for every day he or they shall neglect or refuse to make and file such report.

It will be noted that the statute makes it the joint duty of the “president and treasurer” of such cor-

porations to file such report (after a written request therefor, and the filing of a report by any other officers of the corporation, or by the president or treasurer alone, would not be a compliance with the statute.

(*McCrea vs Bedell*, 29 N.Y. Sup. 705; *St. John vs Eberlin*, 51 N.Y. Sup. 998-999)

The complaint therefore should allege in substance;

First: That the corporation itself failed to file the required annual report within the time provided by statute;

Second: That following the corporation's failure so to do, a written request was made upon both the president and treasurer of the corporation to make and file such report, by a creditor or stockholder of the corporation;

Third: The refusal or neglect of such officers to file such report within ten days after written request so to do.

The weakness of plaintiff's complaint lies in the fact that although a joint and several liability is created against the president and treasurer of the corporation for failure to file such annual report after a written request is made of them so to do, the law makes it their joint duty to file such report, and therefore before recovery can be had under the statute against either the president or treasurer of such corporation a demand must be made upon both

the president and treasurer of such corporation to file such report, and then if they fail to do so within the time prescribed by the statute, either or both the president and treasurer are liable for their failure so to do. [9]

In this case the complaint states that demand was made upon the treasurer only. Such a demand, we think, is insufficient, for the reason that even had the treasurer furnished or filed a report made and verified by himself only, it would not be a compliance with the statute, which requires a report signed and verified by both the president and treasurer.

We therefore hold that the first ground of defendant's demurrer to plaintiff's complaint, viz. that there is a defect in non-joinder of necessary parties defendant, is untenable for the reason that the statute in question creates a joint and several liability as against both the president and treasurer of the corporation for violation of the statute; and

That the second ground of demurrer, viz. that the complaint does not state facts sufficient to constitute a cause of action against the defendant, Wallis George, is good, as the statute requires a written request to be made upon both the president and treasurer, before any cause of action accrues for the penalty prescribed by the statute.

The defendant also urges that the statute gives a right of action only to an "aggrieved creditor or stockholder." There is, however, no merit to this contention. An aggrieved creditor or stockholder, as

contemplated by our statute, has generally been held to be anyone who has a right to demand the filing of such a report, and a "stockholder" has been almost universally held to be such an aggrieved person. (See "Aggrieved" and "Aggrieved Creditor and Stockholder" in *Words & Phrases*, Perm. Ed.)

Nor do I consider there is any merit to defendant's contention that "the penalty exacted by the statute is arbitrary, unreasonable, excessive, discriminatory and amounts to a confiscation of defendant's property without due process of law." [10]

The true rule, as applied to cases of this kind is laid down by Mr. Justice Story in *People vs Quant*, 12 Howard Practice at page 91, wherein he says:

"We are undoubtedly bound to construe penalty statutes strictly and not to extend them beyond their obvious meaning by strained inferences. On the other hand we are bound to interpret them according to the manifest import of the words and to hold all cases which are within the words and the mischiefs, to be within the remedial influence of the statute.

When a statute, as this one does, imposes a specific obligation upon a corporation official, the courts cannot alter or lessen the penal consequences of default; for that is a matter of legislative wisdom and not judicial concern and policy. There is an apparent disposition to avoid cumulative penalties wherever the statute is capable of an interpretation that permits the

courts to hold but one penalty recoverable, but this course can not be indulged when the act invoked gives a separate and distinct penalty for every offense, or for every day's delay, as is the case here."

(Suydam vs Smith 52 N.Y. Sup. 983; St. John vs Eberlin, 51 N.Y. Sup. 998-1000)

"The defendant had the power to stop the running of penalties by complying with the statute, which in plain language provides that until he does yield compliance the penalties are to accumulate. True, the plaintiff might have brought his suit sooner and thereby put a limit to the amount of his recovery, but there seems to be nothing which requires a plaintiff pursuing a statutory remedy for his protection to consult the interests of the wrongdoer whose violation furnishes the very grievance sought to be redressed. The plaintiff by force of the statute, is entitled to recover, not only the penalty of Fifty Dollars for failure to furnish the required statement, but the further sum of ten dollars for every day's neglect to furnish the same, up to the time of the commencement of the action, aggregating \$1750.00. Judgment on the special verdict is therefore rendered for this amount, with costs.

(St. John vs Eberlin, 51 N.Y. Supp. 998-1000)

We therefore hold that the complaint in this case does not state a good cause of action against the defendant Wallis George, under our statute, although if the plaintiff had made a demand upon both the president and treasurer of said corporation, either or both of them would have been [11] liable for their failure to comply with such request.

The first ground of defendant's demurrer is therefore denied, and the second ground of demurrer sustained. An order may be prepared in compliance with this opinion, and it is so ordered.

Dated at Juneau, March 16, 1942.

GEO. F. ALEXANDER

Judge.

[Endorsed]: Filed Mar. 21, 1942. [12]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 4816—A.

CASH COLE,

Plaintiff,

vs.

WALLIS GEORGE,

Defendant.

FINAL JUDGMENT

This cause having heretofore come regularly on for hearing upon the defendant's demurrer to the

plaintiff's amended complaint, and argument having been had by counsel for the respective parties, and the court thereupon having sustained said demurrer on the second ground therein set forth, to-wit, the failure of the amended complaint to state facts sufficient to constitute a cause of action against the defendant, Wallis George, and having on the 8th day of April, 1942, made and entered its order herein sustaining said demurrer and the plaintiff, by his attorney of record, now announcing in open court that he stands upon his amended complaint and refuses to plead herein & plaintiff requests that judgment be entered herein, and the court being fully advised in the premises;

Now, therefore, it is hereby ordered, adjudged and decreed, that these proceedings and the plaintiff's amended complaint be and the same are hereby dismissed and that the plaintiff take nothing hereby, to all of which the plaintiff excepts and his exception is hereby allowed.

Dated this 8th day of April, 1942.

GEO. F. ALEXANDER

District Judge.

OK as to form.

HAROLD H. BATES

Atty. for Plaintiff.

HOWARD D. STABLER

Atty. for Defendant.

[Endorsed]: Filed and Entered April 9, 1942. [13]

[Title of District Court and Cause.]

PETITION FOR APPEAL

Comes now Cash Cole, the above named Appellant (Plaintiff) and complains that in the records and proceedings had in this court in this cause and also in the rendition of the Final Judgment against him on the 9th day of April, 1942, whereby this court rendered final judgment upon appellant's (plaintiff's) refusal to further plead herein, in favor of Appellee (defendant), Wallis George, and against Appellant (plaintiff), Cash Cole, and finally dismissed appellant's (plaintiff's) amended complaint and claim for a statutory penalty for the refusal or neglect of the appellee (defendant), Wallis George, as Treasurer of the Baranof Hotel, Inc., to file the annual report of the said Baranof Hotel, Inc., a corporation, for the year of 1940, after written request to do so had been made by the appellant, (plaintiff), as provided by the laws of the Territory of Alaska, and decreed that the appellant (plaintiff) should take nothing by these proceedings, manifest error has happened to his damage as will more fully appear from the assignments of error filed herewith, and respectfully appeals to the United States Circuit Court of Appeals for the Ninth Circuit for such further orders and processes as may cause the said errors to be corrected, and respectfully prays that this, his appeal may be allowed and that a citation may issue upon said appeal and that a transcript of

the record herein may be sent to the said Honorable [14] Circuit Court of Appeals at San Francisco, California, and that an order may be entered herein fixing the amount of the bond, as a cost bond, to be given by him; and your petitioner will ever pray.

HAROLD H. BATES

Attorney for Appellant.

Copy of the foregoing petition received this 11th day of April, 1942.

HOWARD D. STABLER

Attorney for Appellee.

[Endorsed]: Filed Apr. 11, 1942. [15]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The foregoing petition of the above named appellant, praying for an order allowing an appeal from the judgment of the said above entitled court to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed, and that citation may issue upon said appeal for the transcript of the records to be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; that the amount of the bond to be given by the petitioner as a cost bond is

hereby fixed at Two Hundred Fifty (\$250.00) Dollars.

Done in open court this 11th day of April, 1942.

GEO. F. ALEXANDER,

District Judge.

Copy of the foregoing order allowing appeal received this 11th day of April, 1942.

HOWARD D. STABLER,

Attorney for Appellee.

[Endorsed]: Filed and Entered April 22, 1942.

[16]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the appellant (plaintiff), Cash Cole, and respectfully assigns, in connection with his petition for appeal herein, the following errors committed in the proceedings and in the trial of the above-entitled cause, which he intends to urge upon the hearing of the appeal herein, and upon which he relies to reverse the judgment entered herein on April 9th, 1942, in favor of Appellee (defendant) and against appellant (plaintiff), whereby appellant's (plaintiff's) amended complaint and these proceedings were dismissed and the appellant (plaintiff) decreed to take nothing by said proceedings:

I.

The court erred in sustaining the second point of

defendant's (appellee's) demurrer to plaintiff's (appellant's) amended complaint, to-wit, in holding that said amended complaint does not state facts sufficient to constitute a cause of action against defendant (appellee), to which ruling plaintiff (appellant) excepted and which exception was duly allowed.

II.

The court erred in making and entering herein its certain judgment, dated April 9th, 1942, in favor of the Appellee (defendant) and against the Appellant (plaintiff) and in finally dismissing appellant's (plaintiff's) amended [17] complaint, to which ruling appellant (plaintiff) duly excepted and his exception was allowed.

Wherefore, the appellant (plaintiff) prays that the judgment above referred to may be reversed.

HAROLD H. BATES,

Attorney for Appellant.

Copy of the foregoing assignment of errors received this 11th day of April, 1942.

HOWARD D. STABLER,

Attorney for Appellee.

[Endorsed]: Filed April 11, 1942. [18]

[Title of Court and Cause.]

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Cash Cole, as Principal and United

States, Fidelity and Guaranty Company, a corporation, as Surety, hereby acknowledge ourselves to be indebted and firmly bound to pay to Wallis George, the sum of Two Hundred Fifty and No/100— (\$250.00) Dollars, in good and lawful money of the United States of America, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of April, 1942.

The condition of this obligation is such that whereas the above bounden Cash Cole has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered and entered in this cause on April 11, 1942, wherein and whereby it is finally ordered, adjudged and decreed that plaintiff's amended complaint be dismissed and that the plaintiff take nothing by these proceedings.

Now, therefore, if the said Cash Cole shall prosecute his said appeal to effect and shall answer for and pay all costs as may be awarded against him, if he fails to make his plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

CASH COLE,
Principal.

[19]

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation.

(Seal) By: M. E. MONAGLE,

Its attorney-in-fact and Agent. Surety.

United States of America,

Territory of Alaska.—ss.

Acknowledged before me this 11th day of April,
1942.

[Seal]

HAROLD H. BATES,

Notary Public for Alaska.

My Commission expires Feb. 14, 1945.

ORDER

Now, on this day, it is hereby ordered that the fore-
going bond on appeal be and it is hereby approved
as to sum and sufficiency of surety.

Done in Open Court this 22nd day of April, 1942.

GEO. F. ALEXANDER,

District Judge.

Copy received this 11th day of April, 1942.

HOWARD D. STABLER,

Attorney for Defendant.

[Endorsed]: Filed April 22, 1942. [20]

[Title of Court and Cause.]

CITATION ON APPEAL

United States of America,

Territory of Alaska.—ss.

THE PRESIDENT OF THE UNITED STATES,

To the Appellee (Defendant), Wallis George, and
his attorney, Howard Stabler, Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the state of California, within thirty days from the date of this citation pursuant to an order heretofore duly made and entered herein on April 11, 1942, by the District Court for the Territory of Alaska, Division Number One, in this cause, wherein you, said Wallis George, are defendant and appellee, and Cash Cole is plaintiff and appellant, allowing the latter's said appeal to said Honorable Circuit Court of Appeals from that certain judgment hereinafter mentioned, and then and there show cause, if any there be, why that certain judgment heretofore entered herein on April 9th, 1942, in favor of Appellee (Defendant), Wallis George, and against Appellant (Plaintiff) Cash Cole, and finally dismissing said plaintiff's (Appellant's) amended complaint and said proceedings in said District Court, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States this 11th day of April, 1942.

GEO. F. ALEXANDER,
District Judge.

Copy of the foregoing citation received this 11th day of April, 1942.

HOWARD D. STABLER,
Attorney for Appellee.

[Endorsed]: Filed and Entered April 22, 1942.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed that the title of the court and the cause be *ommitted* by the Clerk of the above-entitled court from the transcript of the record in the above-entitled cause.

HAROLD H. BATES,
Attorney for Appellant.
HOWARD D. STABLER,
Attorney for Appellee.

[Endorsed:] Filed April 22, 1942. [22]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Juneau, Alaska:

Please prepare a transcript of record in the above-entitled cause, including therein the following papers, to-wit:

1. Plaintiff's (Appellant's) amended complaint filed March 28, 1942.
2. Defendant's (Appellee's) demurrer to plaintiff's (Appellant's) amended complaint.
3. Order sustaining point two (2) of defendant's (appellee's) demurrer to plaintiff's (appellant's) amended complaint.
4. Court's written opinion on demurrer.
5. Final Judgment filed April 9th, 1942.

6. Petition for Appeal.
- 6 (a). Order allowing Appeal.
7. Assignments of error.
8. Cost bond, with order approving it.
9. Original Citation.
10. Stipulation of Attorneys for printing of record.
11. This Praeceptum.

Kindly prepare said transcript and forward it in accordance with said rules of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

HAROLD H. BATES,
Attorney for Appellant.

Copy received this 11th day of April, 1942.

HOWARD D. STABLER,
Attorney for Appellee.

[Endorsed]: Filed April 22, 1942. [23]

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
First Division.—ss.

I, Robert E. Coughlin, clerk of the district court for the territory of Alaska, First Division, hereby certify that the foregoing and hereto attached 24 pages of typewritten matter, numbered from 1 to 24, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record pre-

pared in accordance with the praecipe of the Plaintiff-appellant on file herein and made a part hereof, in cause No. 4816-A, wherein Cash Cole is Plaintiff-appellant and Wallis George is Defendant-appellee, as the same appears of record and on file in my office, and that said record is by virtue of a Petition for Appeal and Citation issued in this cause and the return thereof in accordance therewith.

And I do further certify that this transcript was prepared by me in my office, and that the cost or preparation, examination and certificate, amounting to Ten and 40/100 (\$10.40) has been paid to me by Plaintiff-appellant.

In witness Whereof, I have hereunto set my hand and caused the seal of the above entitled Court to be affixed this 22nd day of May, 1942.

ROBERT E. COUGHLIN,
Clerk.

By: J. W. Leivers, Deputy. [24]

[Endorsed]: No. 10147. United States Circuit Court of Appeals for the Ninth Circuit. Cash Cole, Appellant, vs. Wallis George, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska. Division Number One. Filed May 25, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit at San Francisco

Docket No. 10147

CASH COLE,

Appellant,

--versus--

WALLIS GEORGE,

Appellee.

STATEMENT OF POINTS ON APPEAL

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and Howard Stabler, Attorney for the Appellee. Please be advised that the appellant adopts all the assignments of error appearing in the transcript of the record as his points on appeal.

HAROLD H. BATES,
Attorney for Appellant.

Due service admitted this 19 day of June, 1942.

HOWARD D. STABLER,

By: G. S.

Attorney for Appellee.

[Endorsed]: Filed June 29, 1942, Paul P. O'Brien,
Clerk.



CASE NO. 10147

10

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CASH COLE,

Appellant,

VS.

WALLIS GEORGE,

Appellee.

FILED

AUG 24 1902

PAUL P. O'BRIEN,
CLERK

APPELLANT'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE

HAROLD H. BATES,
Attorney for Appellant.

SUBJECT INDEX

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STATUTES CITED

Compiled Laws of Alaska, 1933, Sec. 923 as amended by Session Laws of Alaska, 1935	2
Compiled Laws of Alaska, 1933, Sec. 1091, U. S. C. A., Title 28, Section 104	5
Compiled Laws of Alaska, Sections 4050, 4051, 4052, 4055, 4056, 4058, U. S. C. A., Title 28, Section 225	5

CASE NO. 10147

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

APPELLANT'S BRIEF

STATEMENT OF CASE

The question involved in this appeal is whether under Section 923 of the Compiled Laws of Alaska of 1933 as amended by Section 923 of the Session Laws of Alaska of 1935, it is necessary to make a written request upon both the President and the Treasurer of a corporation or whether written request upon only

one, to-wit, the treasurer is sufficient to make that one liable for the amount provided as a penalty, in the amended section referred to?

Section 923, Session Laws of 1935:

The section, as amended reads as follows:

“Every corporation formed under this article, shall annually, within sixty days from the first day of January of each year, file with the Auditor of the Territory of Alaska and with the Clerk of the District Court in each Division wherein business of the corporation is conducted, a report made and verified by the president and the treasurer and shall keep a copy thereof at its main office for inspection of stockholders, which shall state:

1. The amount of its capital stock and the amount actually issued.
2. The amount of its debts.
3. The amount of its assets.
4. The name and addresses of all the directors and officers of the corporation.

Any corporation organized under the provision of this title whose fiscal years ends at any other time than the end of the calendar year, shall be allowed sixty days from the date on which its fiscal year ends within which to file this report.

And if any corporation shall fail to file its annual reports as required in this section, all contracts made by such corporation with the residents

of the Territory of Alaska, made in the Territory shall be voidable as to the corporation during the time it shall neglect to file such report, and no Court in the Territory shall enforce same in favor of the corporation.

If any report be not made and filed as prescribed in this section, either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request to do so shall have been made by a creditor or a stockholder, of the corporation, shall be under penalty of \$50.00 recoverable by such aggrieved creditor or stockholder, for every day he or they shall so neglect or refuse."

SPECIFICATION OF ERROR

Appellant-Petitioner relies upon each of his two specifications of error, namely:

I.

The court erred in sustaining the second point of defendant's (appellee's) demurrer to plaintiff's (appellant's) amended complaint, to-wit, in holding that said amended complaint does not state facts sufficient to constitute a cause of action against defendant (appellee), to which ruling plaintiff (appellant) excepted and which exception was duly allowed.

II.

The court erred in making and entering herein its certain judgment, dated April 9th, 1942, in favor of the Appellee (defendant) and against the Appel-

lant (plaintiff), and in finally dismissing appellant's (plaintiff's) amended complaint, to which ruling appellant (plaintiff) duly excepted and his exception was allowed.

THE FACTS

The plaintiff's amended complaint alleged that the plaintiff is a stockholder and the defendant, Wallis George, is secretary and treasurer of the Baranof Hotel, Inc., an Alaska corporation; that it was the duty of the corporation to file its annual report of its financial condition for the year of 1940 with the Auditor of the Territory and the Clerk of the Court for the First Division; that upon the failure of said corporation to file said report it became the duty of the defendant Wallis George to file said report within ten (10) days after written request to do so had been made upon him by a stockholder; that the plaintiff made such a written request upon the defendant treasurer and secretary of the corporation; that the report of the financial condition of the corporation be filed as aforesaid for the year of 1940; that the defendant refused and neglected to file said report up to the time of filing the complaint in this action to file said report; that by reason of the premises the defendant became indebted to the plaintiff for the penal sum as provided by the statute.

Defendant's demurrer to the amended complaint was sustained by the trial court on the ground that the

amended complaint failed to state facts sufficient to constitute a cause of action; the court held that a written request must be made upon both the treasurer and the president and that the allegation must appear in the complaint that the written request was so made, upon both the president and treasurer.

BASIS OF JURISDICTION

The District Court of the Territory of Alaska had jurisdiction of this case under the provisions of Section 1091, Compiled Laws of Alaska of 1933, and Section 104, Title 28, U. S. C. A.

The Circuit Court of Appeals has jurisdiction in this cause upon appeal, under Sections 4050, 4051, 4052, 4055, 4056, and 4058, Compiled Laws of Alaska of 1933, and by virtue of Section 225, Title 28, U. S. C. A.

The amount in controversy is more than \$6,000.00.

ARGUMENT

The assignments of error are directed to appellant's contention that the trial court's holding that the amended complaint did not state facts sufficient to constitute a cause of action is contrary to law.

The argument in support of this contention falls into three (3) parts, the first of which is . . . Does Section 923 of the Compiled Laws of Alaska of 1933 as

amended by the Session Laws of Alaska of 1935 place the duty on the corporation to file a financial report, made and verified by the president and treasurer, in the first instance, by virtue of paragraph one (1) of said section, or is the duty on the president and treasurer?

Second, If the duty is on the corporation in the first instance then following the corporation's failure to file said report, does the duty devolve upon the president and treasurer jointly, jointly and severally, or severally, after written request to file such report has been made upon either of such officers by a stockholder?

Third, Is it necessary for an aggrieved stockholder to make a written request upon both the president and treasurer of said corporation, in order to subject the one officer who has been requested to perform such duty, to the statutory penalty?

If the duty is on the corporation in the first instance to file said annual report then there is no duty on either the president or treasurer until a written request is made upon either of such officers. If the duty is on the corporation in the first instance, and it devolves upon the president and treasurer severally, or jointly and severally, then it is sufficient to make a written request on either of such officers and the officer upon whom the written request is made is obligated to perform. If the duty devolves upon the

president and treasurer after written request is made upon either of them, it is not necessary to make a written request on both of such officers in order for a stockholder to recover the statutory penalty.

If we are correct in any of the three (3) contentions the amended complaint alleges sufficient facts to constitute a cause of action in this case.

FIRST POINT

Does Section 923 of the Compiled Laws of Alaska of 1933 as amended by Section 923 of the Session Laws of Alaska of 1935 place the duty on the corporation to file an annual financial report, made and verified by the president and treasurer in the first instance, by virtue of paragraph one (1), or is the duty on the president and treasurer from the beginning?

It is appellant's contention that by the statute the duty is placed upon the corporation, to file the annual financial report, made and verified by the president and treasurer. If the corporation files a report which is not made and verified by both the president and treasurer it would not be sufficient and the corporation would fail to comply with the statute.

The statute in paragraph four (4) of the section quoted, provides that if the corporation fails to file said report the duty falls upon either the president or treasurer to file it, if written request to do so is made upon either of such officers, by a stockholder, and if

he or they neglect or refuse to file said report, he or they shall be liable in the penal sum of \$50.00 per day to such aggrieved stockholder for every day they delay. It is contended by the appellant that this paragraph makes either the president or treasurer severally liable if written request is made upon either of them and he neglects, fails or refuses to perform, after such corporation has failed to do so. It is further contended that written request on one is sufficient to make that officer liable for the statutory penalty as the duty which devolves upon him is a several duty and not a joint duty.

Appellant contends that since the duty which devolves upon either the president or treasurer by virtue of paragraph four (4) is several and that the liability is several that if written request is made upon one of the officers, he can make and verify the report and file the same as required by statute, and that upon so doing he has discharged his duty; that even though the report be made and verified only by the officer on whom the demand is made, it is a sufficient report and that no liability would accrue against him; if this be true, it necessarily follows that if the demand is made on both officers they both must make and verify the report and if only one does, the defaulting party would become liable for the statutory penalty, for his neglect or refusal.

Paragraph four (4) of the statute does not say

that demand shall be made upon both the president and treasurer. The penalty of the statute is placed upon either of such officers for the failure of either of such officers to file the report after written request to do so has been made by a stockholder.

In paragraph three (3) of the statute it is provided that the contracts of the CORPORATION with residents of Alaska, shall be voidable as against the corporation, as long as it neglects or fails to file said report. This paragraph makes the contracts of the corporation voidable and not the contracts of the President or Treasurer voidable. It is submitted that this paragraph clearly shows that the intent of the legislature was to place the duty in the first instance on the corporation to file an annual report, which report was to be made and verified by the president and treasurer. If the legislature had intended the duty to have been placed upon the president and treasurer then the legislature would have made the contracts of the president and treasurer voidable or placed upon them some other burden.

SECOND POINT

If the duty to file the report is on the corporation in the first instance, then upon the corporation's failure to file it, does the duty to do so, devolve upon the president and treasurer jointly, severally, or jointly and severally, after written request is made upon either of them by a stockholder?

In paragraph four (4) of the section quoted, it is provided that if any report be not made and filed as required by the statute, either of such officers who shall thereafter refuse or neglect to make and file such report within ten (10) days after written request to do so shall have been made by a stockholder shall be under a penalty of \$50.00 recoverable by such aggrieved stockholder for every day he or they shall so neglect or refuse.

It is to be noted that this paragraph says that either of such officers shall be liable after written request has been made by a stockholder to file the report.

The appellant contends that if demand is made on one of the officers, that such officer is the only one liable, as the duty which devolves upon either of such officers by virtue of paragraph four (4) is a several duty and not a joint duty.

If demand is made upon both officers and one of them neglects and the other complies with the request, it is obvious that the one who neglects is liable and the one who complies is not liable for the statutory penalty.

If the duty is on the corporation in the first instance, as we contend, then no duty was upon the president and treasurer until the corporation has failed to perform its duty and after written request was made upon either or both of them. When the demand was

made upon the defendant, Wallis George, though no demand was made upon the president, it became the duty of the defendant and he could have fulfilled that duty by making and verifying a report and filing said report as required by statute. It is obvious that the treasurer could not have made the president verify the report whether demand had been made upon the president or not, but that the treasurer could have fulfilled his duty by making and verifying the report and filing same.

THIRD POINT

Is it necessary for an aggrieved stockholder to make a written request on both the president and treasurer, or is a demand upon one of them sufficient to subject him to the statutory penalty if he fails or refuses to make and file the report within the period prescribed by the statute.

Appellant contends that the liability imposed upon either of such officers who neglects to perform such duty, is a several or joint and several liability and that it is not necessary to make the written request upon both officers, in order to subject the one to the penalty upon whom request was made. The duty is several or joint and several and the liability accordingly.

The statute does not state that both of such officers must be requested to make and file the report, but on the contrary, states that if either of them fails to per-

form after written request shall be liable. It follows that written request upon either of them is sufficient to subject him to the penalty imposed by the statute for his failure to comply.

CONCLUSION

Paragraph one (1) of the statute in question states that the duty is on the corporation to file a report, made and verified by the president and treasurer, within a certain period of time. If the corporation filed a report which was not made and verified by the president and treasurer, it would be the same as no report at all.

Paragraph two (2) of the statute provides that the corporation shall be penalized if it does not perform such duty as stated in the first paragraph, to-wit, that the contracts of the corporation with the residents of Alaska shall be voidable, as to the corporation, until such corporation performs such duty.

Paragraph four (4) of the statute provides that the duty shall devolve to the president and treasurer if written request is made upon either of such officers by a stockholder and if he or they neglect or refuse he or they shall be liable for the penalty as provided by the statute.

Paragraph four (4) places this duty on the officer for the first time, after the corporation fails to perform

such duty. There was no duty upon them either severally or jointly and severally before the written request was made by the stockholder. After the request was made upon either of such officers then the duty was placed upon him for the first time. He could perform this duty without the aid or assistance of the other officer.

The duty and liability upon the president and treasurer, as provided by paragraph four (4) is several or joint and several, and it is not necessary to make a written request upon both in order to make the one upon whom written request was made liable, for the penalty provided by the statute.

We think, therefore, that the trial court erred in sustaining defendant's demurrer to plaintiff's amended complaint on the ground that the facts alleged are insufficient to constitute a cause of action against defendant for failure to file the annual report of the corporation of which he is secretary and treasurer, after having been requested, in writing, to do so, by plaintiff stockholder.

Respectfully submitted,

HAROLD H. BATES,

Attorney for Appellant.



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

APPELLEE'S BRIEF

ON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
DIVISION NO. 1.

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Attorney for Appellee.

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CASE NO. 10147

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CASH COLE,

Appellant,

VS.

WALLIS GEORGE,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF CASE

This action was commenced in the District Court for the Territory of Alaska, First Division, at Juneau, by the appellant Cash Cole (hereinafter called the plaintiff), a stockholder of the domestic corporation Baranof Hotel Incorporated, against the appellee

Wallis George (hereinafter called the defendant), the treasurer of said corporation, to recover from the defendant personally a statutory penalty of \$50.00 per day for the period of 63 days, and amounting to \$3,-150.00, on account of the alleged refusal and neglect of the defendant, for 63 days after written request by the plaintiff stockholder, to make and file the annual corporation report required by Section 923, Compiled Laws of Alaska for 1933, as amended by Chapter 89, page 183, Session Laws of Alaska for 1935 (correctly quoted on page 2 of Appellant's Brief).

The defendant demurred (Trans. p. 7) to the plaintiff's amended complaint on the statutory grounds (C.L.A. 3416, 4 and 6) :

1. That there is a defect in non-joinder of necessary parties defendant; and
2. That the complaint does not state facts sufficient to constitute a cause of action against the defendant Wallis George.

The defendant's demurrer to the plaintiff's amended complaint was sustained (Trans. p. 7) by the District Court; and the Court in its written opinion (Trans. p. 8) gave its reasons for sustaining the demurrer. The plaintiff refused to plead further, and judgment dismissing the plaintiff's action was entered (Trans. p. 15). The plaintiff has appealed to this Court from the judgment of dismissal.

THE STATUTE INVOLVED

Section 923, Compiled Laws of Alaska for 1933 (correctly quoted at page 2, Appellant's Brief) was originally enacted by the Territorial Legislature at its 1931 Session as Section 23 of Chapter 8 (Session Laws of Alaska for 1931). It was incorporated in the Compiled Laws of Alaska for 1933 as Section 923. Section 923 was amended, to read as quoted, at the 1935 Session. As far as we know no court, other than the District Court for the First Division in its Opinion filed in this action (Trans. p. 8), has ever attempted to construe the involved wording of the statute in respect of the points now before the court. As far as we know the statute is the original idea of the Alaska Legislature. We have not been able to find a similar statute anywhere assessing such a heavy and arbitrary penalty against officers of a corporation personally in favor of creditors and stockholders; and without any showing required by such creditors or stockholders that they were in some way damaged or injured in consequence of failure to file the report. Such is the statute on which the plaintiff relies for recovery of the penalty.

STATEMENT OF FACTS

The plaintiff's amended complaint (Trans. p. 2) sets up that the Baranof Hotel Incorporated is a domestic corporation of Alaska; that Section 923 requires domestic corporations to file an annual report in specified Territorial offices; that the corporation failed to

file the report; that,

“On the 17th day of November, 1941, this plaintiff, as a stockholder, made a written request of the defendant Wallis George, treasurer of said corporation, that such duty be performed, to wit, file said annual report, as required by law, of the said Baranof Hotel Corporation; that said defendant Wallis George, as hereinbefore alleged, failed, refused and neglected to make or cause to be made said annual report and file the same with the Auditor of the Territory of Alaska and the clerk of the District Court for the First Division; that at the date of the filing of the first complaint on behalf of the plaintiff sixty-three (63) days had expired since plaintiff Cash Cole made said written request herein above referred to, to wit, from the 17th day of November, 1941, to January 19th, 1942; that by reason of the premises the defendant forfeited and became indebted to the plaintiff in the sum of \$3,150.00, whereby an action accrued to this plaintiff in accordance with Section 923 of the Session Laws of Alaska of 1935.”

The defendant contends in support of his demurrer to the plaintiff's amended complaint:

Point 1. That Section 923 makes it the duty of the president and treasurer of the corporation jointly, and not severally, to make, verify and file the annual report required by the statute; and as the plaintiff's amended complaint shows only a written request was made on the treasurer to make and file the report, and no request whatever made on the president, the amended complaint fails to state facts sufficient to constitute a cause of action.

Point 2. That the statute gives a right of action only to an "aggrieved" stockholder or creditor of the corporation; and the plaintiff's amended complaint fails to show that the plaintiff is such a stockholder or creditor.

Point 3. That the penalty exacted by the statute, when applied to the facts of the case before the court, as shown by the plaintiff's amended complaint, is arbitrary, unreasonable, excessive, discriminatory, and amounts to confiscation of the defendant's property without due process of law.

ARGUMENT

Statutes allowing a stockholder to recover a penalty from officers are penal in character. Such statutes are to be strictly construed, and liability exists only when the case is brought within the statute. 14A Corpus Juris 168; and 25 Corpus Juris 1197.

So construing the statute and plaintiff's amended complaint, the District Court's order sustaining the defendant's demurrer, and its judgment dismissing the plaintiff's action, should be affirmed for the following reasons:

POINT 1

The statute definitely places the duty on the corporation itself in the first instance of annually filing a report "made and verified by the president and treasurer" of the corporation. The words of the statute in this respect are:

“Every corporation formed under this article shall annually . . . file with the Auditor . . . and with the Clerk of the District Court . . . a report **MADE AND VERIFIED BY THE PRESIDENT AND TREASURER.**” (Capitalization ours).

Therefore, in the first instance, any officer of the corporation, or any person representing the corporation, such as its attorney as is generally the case, may file the report. As far the officers of the corporation are concerned, the only condition of the statute is that the report “shall be made and verified by the president and treasurer of the corporation.”

The statute then prescribes that:

“If any report be not made and filed **AS PRESCRIBED IN THIS SECTION**, either of such officers who shall thereafter refuse or neglect **TO MAKE AND FILE SUCH REPORTS** within ten days after a written request to do so shall have been made by a creditor or a stockholder of the corporation, shall be under penalty of \$50.00 recoverable by such **AGGRIEVED** creditor or stockholder, for every day he or they shall so neglect or refuse.” (Capitalization ours).

In order for a creditor or stockholder of the corporation to fix a personal liability for the penalty on the president or treasurer of the corporation for their refusal or neglect to **MAKE AND FILE** the report required by the statute all the conditions fixing the penalty and the personal liability for the penalty must be shown in the complaint, namely:

1. That the corporation itself failed to file with the Territorial Auditor and Clerk of the District Court "a report made and verified by the president and treasurer" of the corporation.

2. A written request made by a creditor or stockholder of the corporation upon BOTH the president and treasurer of the corporation to **MAKE AND FILE** the report required by the statute, namely, a report **MADE AND VERIFIED** by both the president and treasurer of the corporation.

3. Refusal or neglect of both, or either, the president and/or treasurer of the corporation "to make and file" the report required by the statute, within 10 days after such written request made on both; and

4. That the creditor or stockholder was "aggrieved" in some manner recognized by law.

The words of the statute which fix the penalty are: "refusal or neglect to make and file the report as prescribed in this section." The word "section" plainly means Section 923 of the Compiled Laws of Alaska. According to Section 923, the report which is to be made and filed must contain the information specified in the statute; and it must be "made and verified" by both the president and treasurer of the corporation. There is no several duty on the part of the treasurer to make and verify, or to make and file, the report. A report made and verified only by the treasurer is not the report prescribed in Section 923. Unless the report is made and verified by both the president and treas-

urer of the corporation it is a nullity; and does not operate to release the president or treasurer from the statutory liability. 14A Corpus Juris 213, Section 2019.

Nowhere in the statute is there any modification of the original statement of essential information which the report shall contain. Nor is there any modification whatever of the provision that the report shall be made and verified by both the president and treasurer of the corporation; nor any modification whatever of the joint duty of the president and treasurer to make and file the report. The only report that will satisfy the statute is a joint report containing the information specified by the statute, made and verified by both the president and treasurer of the corporation.

In this case, where demand was made only on the treasurer to make and file the report, the treasurer could not by himself make and file such a report as the statute requires. The treasurer could not compel the president to make and verify the report with him. The president of the corporation is not liable to the stockholder for the penalty, for no demand was made on the president by the stockholder. The stockholder could enforce by penalty the refusal or failure of the president to make and verify, or make and file, the report with the treasurer, but he has failed to take any step to do so.

It seems plain that the duty to make and file the

report is JOINT,—the duty of both the president and the treasurer, and not the several duty of the one or of the other; and that the duty to file the report within 10 days, and the liability for the penalty in case of failure to do so, are not set in motion by a written request on one to perform the duty. The demand for performance of the statutory duty must be made on all who are jointly obliged to perform it; and all must be joined in the action.

Where proper demand is made on both the president and treasurer, and “either of such officers thereafter refuse or neglect to make and file such reports” within 10 days, both of them are, or either of them is, liable for the penalty. The final words of the statute fixing a penalty of \$50.00 “for every day HE OR THEY shall so neglect or refuse” indicate that after demand on both, if ONE refuses or neglects to participate with the other in making and filing the report which the statute requires both to make and verify, or if BOTH refuse or neglect to make and file the report, HE OR THEY become severally or jointly liable for the penalty, depending upon the circumstances of whether one or both neglect or refuse.

That such was apparently the intention of the Legislature is further evidenced by the fact that the statute as originally enacted in 1931 read:

“\$50.00 recoverable by such aggrieved cred-

itor or stockholder for every day HE shall so neglect or refuse”,

and now, since amendment by the 1935 Legislature, reads:

“\$50.00 recoverable by such aggrieved creditor or stockholder for every day HE OR THEY shall so neglect or refuse.”

Therefore, before both, or either, become liable for the penalty the joint duty, and the joint or several breach of that duty, must be established and pleaded. Certainly the statute should not be construed so as to penalize the treasurer of a corporation severally for neglecting to perform a duty which the statute specifically provides can only be performed by the treasurer and president jointly.

The action for the penalty is quasi contractu; and both the treasurer and president of the corporation should have been joined as defendants. The rule is laid down in Pomeroy's Code Remedies (Fifth Ed.) page 327, section 200, as follows:

“In an action against joint debtors, or to enforce a joint liability arising out of contract, all of the joint debtors or joint contractors that are living must be united as co-defendants; and a neglect to make such union of parties, if properly taken advantage of, will be fatal to the action . . . The codes, in the absence of such express provisions as are found in those of some States, have not changed the nature of a joint liability on con-

tract, nor assimilated it to a several or joint and several one."

Sections 3392 and 3859 Compiled Laws of Alaska for 1933 provide:

"Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants . . ."

The plaintiff's amended complaint alleges only a request made on the treasurer Wallis George to make and file the report; and alleges that it was the duty of the treasurer only to make the report. The complaint fails to make the president of the corporation a party defendant. For these reasons the defendant's demurrer should be sustained on both points; and the District Court's judgment dismissing the plaintiff's action should be affirmed.

POINT 2

The statute makes the president and treasurer of the corporation personally liable for the penalty only to an "aggrieved creditor or stockholder." The plaintiff's complaint wholly fails to show that the plaintiff was "aggrieved" in any manner; and therefore it does not state facts sufficient to constitute a cause of action.

The District Court took the narrow view of the statute that any creditor or stockholder was "aggrieved" if he was a creditor or stockholder and the

report was not filed within 10 days after written request was made as provided by the statute; and that it was not necessary for such creditor or stockholder to show that any damage or injury resulted to him from the failure to file the report.

However, if such was the intention of the Legislature, there was no reason for the Legislature to use the words "recoverable by such AGGRIEVED creditor or stockholder." Instead, the Legislature would have said only, "recoverable by such creditor or stockholder." And we think it incredible that the Legislature intended to make an officer of a corporation personally liable to a creditor or stockholder for a cumulative \$50.00 per day penalty, which might amount to \$3,150.00 as is alleged in this case, without a showing by the creditor or stockholder that he suffered loss or injury in some manner,—that he was aggrieved.

In 2 Corpus Juris at page 973 the word "aggrieved" is defined as:

"Having suffered loss or injury; damnified; injured. An aggrieved party or person is one who is injured in a legal sense, one who has suffered an injury to person or property."

In the case of *State v. Central Vermont Railroad*, 21 LRA NS 949, the words "aggrieved party" are defined as "one who is injured in a legal sense; one whose pecuniary interest is directly affected,—enlarged or diminished.

Even under the narrow construction placed upon the word "aggrieved", the plaintiff could not be an aggrieved stockholder if he failed to acquire a right to the penalty by reason of his failure to make a written request on both the president and treasurer of the corporation to make and file the annual report.

The plaintiff's amended complaint wholly fails to show that the plaintiff is an "aggrieved stockholder", and in consequence the amended complaint fails to state a cause of action against the defendant.

POINT 3

The penalty exacted by the statute, when applied to the facts of the case before the court, as shown by the plaintiff's complaint, is arbitrary, unreasonable, excessive, discriminatory, and amounts to confiscation of the defendant's property without due process of law.

In 25 Corpus Juris at page 1180, section 75 is the following statement of law:

"The amount of a penalty to be inflicted rests in sound discretion of the legislature, and it is only when the minimum prescribed by statute is flagrantly oppressive and disproportionate to the offense for which it is imposed that the courts will interfere and refuse to enforce the enactment."

Such, we think is the law generally. But we do not limit our contention herein to the proposition that the Alaska statute imposing a penalty of \$50.00 a day for failure to file a corporation's annual report is in

violation of due process in every case. A case might be found where penalties aggregating \$3,150.00 would not be unreasonable when applied to the facts of that case,—as for instance where a stockholder bought or sold stock and incurred loss amounting to \$3,150.00 which he would not have incurred had the report been filed. Our point is that the statute, when applied to the facts of this case (*Cash Cole v. Wallis George*) deprives the defendant Wallis George of his property in violation of the due process provision of the Constitution; and that the court should hold that the penalty prescribed, when applied to the facts pleaded, are so arbitrary, excessive and unreasonable as to deprive the defendant of his property without due process of law. That such is the case seems at once apparent, if the plaintiff is not required to show any damage or injury.

The plaintiff's amended complaint fails to show that the plaintiff was damaged or injured in any particular by reason of the failure of the officers of the corporation to file the annual report. The plaintiff does not show that he was aggrieved, and in the absence of such a showing it must be presumed that the defendant was not damaged or aggrieved in any pecuniary sense. Without some showing that plaintiff's damage or injury was in reasonable proportion to the penalties claimed, we think the amended complaint, on its face, shows the penalties claimed are so unreasonable, arbitrary and excessive as to deprive the defendant of his property without due process of law.

In the case of *Southwestern Tel. & Tel. v. Danaher*, 238 US 482, 35 Sup. Ct. 886, a statute of the State of Arkansas prescribed a penalty of \$100 for each day a telephone company continued specified discriminations against a telephone subscriber. The action was to recover penalties at the rate of \$100 per day for 63 days for alleged discrimination against the plaintiff. The trial resulted in judgment against the telephone company for \$6300, and the judgment was affirmed by the Supreme Court of Arkansas. The Supreme Court of the United States on appeal said:

“Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine **WHETHER THE APPLICATION MADE OF THE STATUTE IN THIS INSTANCE** was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. What, then, are the circumstances in the light of which this question must be determined?” (Capitalization ours).

The Supreme Court then reviewed the application of the statute to the facts of the particular case, and after reviewing the facts said in conclusion:

“In these circumstances to inflict upon the company penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law. It follows that the ruling of the trial court, as sustained by the Supreme Court of the state, tended to deprive the defendant of a right

secured by the 14th Amendment. The judgment of the lower court is reversed.”

Our point is thus clear: that the court will apply the facts of the case before it in determining whether the penalty is arbitrary and oppressive when applied to the facts of that particular case. So applied it is seen that a court is justified in holding a penal statute, when applied to the facts of a particular case, may work a violation of the due process clause of the Constitution; while the same statute when applied to the facts of another case may not work a violation of the due process guaranty.

That such is the case also appears in the Supreme Court case of *Missouri R.R. Co. v. Tucker*, 230 US 340, 33 Sup. Ct. 961. In this case a statute of Kansas prescribed a schedule of minimum railroad rates for transportation of certain articles and provided that every such railroad carrier,

“which shall demand, exact, or receive for such transportation or delivery any sum in excess of the rates hereby made lawful shall be liable to any person injured thereby in the sum of \$500 as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney’s fee to be fixed by the court.”

The railroad company defended upon the grounds that the statutory rates were confiscatory and void, and that the statute, and particularly the provision for

the recovery of \$500 as liquidated damages, was so arbitrary and unreasonable as to be repugnant to the due process of law and equal protection clauses of the Constitution. The plaintiff recovered judgment for the \$500, which was affirmed by the Supreme Court of the State, and the railroad company appealed to the U. S. Supreme Court. The Supreme Court reviewed the circumstances of the case before it, and said:

“It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of \$500 for every charge in excess of the legislative rates must be tested.

“It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another. What the statute does is to authorize a recovery of \$500 in every case . . . In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, \$3.02, was less than 1/150th of the authorized recovery. . . .

“As applied to cases like the present, the imposition of \$500 liquidated damages, is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the tak-

ing of property without due process of law, and therefore in contravention of the 14th Amendment. Upon this ground the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.”

See also *Chicago & NW RR Co. v. Nye Schneider Fowler Co.* 260 US 35, 43 Sup. Ct. 55 in which the Supreme Court said:

“Such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and ‘violate the rudiments of fair play’ insisted on in the 14th Amendment will be held to infringe it. In this scrutiny of the particular operation of a statute of this kind, we have sustained in it its application to one set of facts by the state court and held it invalid when applied to another . . . ”

It seems clear then that when in any particular case the application of a penal statute, such as the statute relied upon by the plaintiff in this case, shocks the court’s sense of fairness — when its application contravenes the established principles of justice—when it results in an unjust or excessive claim — when its application is oppressive and not fair play — when its application is arbitrary and not proportioned to any actual or legal damage or injury — when, as in this case, the plaintiff has wholly failed to show that he has been “aggrieved” in any particular, the court ought to hold such an application of the statute as to be nothing

short of the taking of property without due process of law.

\$50.00 a day for 63 days,—\$3,150.00 is the plaintiff's prayer for judgment against the defendant Wallis George personally,—as if the plaintiff was entitled to that sum as a reward for making a written request of the defendant to make and file an annual report for the Baranof Hotel Corporation,—all without even a pretense that he had been adversely or injuriously affected in any particular, or "aggrieved" in any manner. The bare statement of the claim itself, as shown in the plaintiff's amended complaint, ought to be sufficient to show that the defendant's demurrer is well taken.

We have herein stated that the penalty imposed by Section 923 is discriminatory. And so it is. The \$50.00 a day penalty is exacted only of the president and treasurer of domestic corporations doing business in the Territory. Foreign corporations doing business in the Territory are required to file annual reports (C.L.A. Section 946, as amended by Chapter 89, Laws 1935). Section 945, as amended by Chapter 89, Laws 1935, provides that:

"If any such corporation or company (foreign) shall attempt or commence to do business in the Territory without having first filed such statements and certificates it shall forfeit the sum of \$25.00 for every day it shall so neglect to file the same . . . "

That penalty is forfeited by the corporation itself, and not by any officer or person; and the penalty is paid into the Territorial Treasury, and not to an aggrieved creditor or stockholder, as in the case of a domestic corporation; and it is the duty of the Attorney General of the Territory to sue for and recover the penalty in the name of the Territory.

While we make no claim of violation of the equal protection clause of the 14th Amendment, same being of questionable application to the Territory, we do claim that the discrimination and other inequitable facts shown are good grounds for holding that the facts of the case before the court do come within the meaning, and protection, of the due process clause of the 5th Amendment, which is unquestionably applicable in the Territory.

CONCLUSION

On the points and reasons stated, we believe the defendant's demurrer to the plaintiff's amended complaint, and the District Court's judgment of dismissal of plaintiff's action, ought to be affirmed.

Respectfully submitted,

HOWARD D. STABLER,

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Juneau, Alaska.

No. 10,147

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CASH COLE,

Appellant,

VS.

WALLIS GEORGE,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska
Division Number One.

APPELLANT'S REPLY BRIEF.

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PAUL P. O'BRIEN.



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No. 10,147

IN THE
United States Circuit Court of Appeals
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CASH COLE,

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VS.

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Appellee.

**Upon Appeal from the District Court for the Territory of Alaska
Division Number One.**

APPELLANT'S REPLY BRIEF.

The appellee's brief argues numerous questions of law. We believe that but one of these is important. That is, does Section 923, Compiled Laws of Alaska for 1933, require that written notice be served upon both the president and treasurer of a corporation to give the stockholder a cause of action? We shall devote the major portion of this reply brief to that point. Questions concerning the necessity of joining both officers; of what constitutes an "aggrieved" stockholder and whether the act is repugnant to the due process clause of the United States Constitution we consider to be minor points worthy of but little reply.

THE ARGUMENT.

The decision of the learned Court below is infused with a subtle error in logic and the appellee's brief mirrors the same mistake. Whether a written notice must be alleged to have been made on both the president and the treasurer of a corporation before recovery can be had under the statute is primarily a matter to be determined by inspecting the statute itself. It is set forth on pages two and three of the appellant's brief.

The Act speaks in the singular number.

Observation shows us that the first paragraph of the statute states the performance required by the Territory. The second paragraph fixes the time in which that performance is to be made. The third paragraph levies a penalty upon the corporation for failure of compliance. The fourth paragraph, with which we are most concerned, levies a penalty upon the officers whose act is necessary for the corporation's performance, and specifies the conditions under which those officers become liable. Does this paragraph require that demand be made upon both the president and the treasurer? As far as the language is concerned we note that the law states

“* * * either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request to do so shall have been made by a creditor or a stockholder * * *”

shall be liable for the penalty provided. “Either” means a single person, one of two, and the legislature

is obviously speaking and thinking in the singular number. If we omit the connective language we find that the substance reads “* * * either * * * after a written request * * .” shall be liable. As far as the language is capable of grammatical analysis it is apparent that the written request is to be made upon either of the officers.

On the contrary, if it had been the legislature's intent to provide that the request must be made upon both, then it would have been simple enough for the legislature to supply the requisite language, as we do here in parentheses:

“* * * either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request (upon both) to do so shall have been made by a creditor
* * .”

shall be liable. As we say, in consideration of the facility with which this addition could have been made, we must conclude that its absence is intentional, and that the legislature did not add the words “upon both” because it did not intend to require a demand upon both. If we are to construe this statute as did the District Court, then we must read into the statute words that are not there and we must disregard the words actually used.

In the opinion of the District Court, at the bottom of page eleven of the transcript, we find the crux of the decision in the following words:

“* * * the law makes it their joint duty to file such report, and therefore before recovery can be had

under the statute against either the president or treasurer of such corporation a demand must be made upon both the president and treasurer of such corporation * * *

No reasons are given in the opinion why the demand must be made on both officers. This mere conclusion of law is supported by no argument and, in fact, is not arrived at by any demonstrable process of logic or deduction. It is, indeed, a supplying to the statute of the words "upon both" that the statute lacks.

Penal statutes must be construed to determine the intent of the legislature.

Grammatical analysis, no matter how favorable the results be to the appellant's position, is not the only means of determining that it was not the intent of the legislature to require service of demand upon both officers. We think that this statute bears further evidence of our contention and we shall proceed with its construction. But it is not inappropriate at this point to discuss what should be the proper attitude for the Court in construing a law of this type. On page five of the appellee's brief is found the statement that this is a penal statute and should be strictly construed. We now show the Court the judicial acceptance of that rule.

Statutes of this type were formerly more prevalent than they are today. The term "penal statute" was frequently used in characterizing them, and the rule of strict construction was often stated. Later cases have brought into question the meaning of the phrase "penal statute", and the legal fashion of more re-

cent times seems to require that they be called "remedial statutes". Certainly many of the incidents of penal statutes do not apply to them. For example, the rule is well known that one state will not enforce the penal statutes of another. Yet in *Huntington v. Attrill*, 46 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. 224, the Supreme Court of the United States approved such enforcement of a statute very similar to the one in this case. The whole question is thoroughly discussed there.

Even the older cases stating the doctrine of strict construction have nevertheless said that the Courts were not justified in taking an unreasonable view of their meaning which would defeat the purpose of the statute. *Cooper v. Nutt*, 254 Ill. App. 445, and many other cases have insisted that the construction to be given to them is one that will enable the legislature's intent to be carried out. To the same effect are *Strope v. Albank Steel, etc., Co.*, 279 N. Y. S. 8, 162 Misc. 934, affirmed 299 N. Y. S. 400, 252 App. Div. 311; *St. John v. Eberlin*, 51 N. Y. S. 998, 23 Misc. 585, 5 N. Y. Ann. Cas. 247. We can summarize the doctrine briefly as this: The ordinary rules and methods of construction are to be applied to the statute to determine the legislature's intent. Once that intent has been found, a plaintiff is required to show that he comes within the statute, and no extensions are made to cover a case which approaches but does not achieve the statutory requirement. But let it be understood that no court has held that the rule of strict construction justifies a refusal to discover the legislature's intent; nor has any

court held that the usual methods of construction are not to be applied to statutes of this type.

Construing the statute as requiring demand on one officer only would not be productive of hardship or unjust result.

It is a well known rule of construction that if two meanings can be placed upon a statute, that one must be avoided which will produce hardship or unjust results in the statute's operation. The appellee argues in the middle of page ten of his brief: "Certainly the statute should not be construed so as to penalize the treasurer of a corporation severally for neglecting to perform a duty which the statute specifically provides can only be performed by the treasurer and president jointly" and in the opinion of the District Court we find the following statement (Transcript, page 12):

"Such a demand, we think, is insufficient, for the reason that even had the treasurer furnished or filed a report made and verified by himself only, it would not be a compliance with the statute, which requires a report signed and verified by both the president and treasurer."

From these statements it is apparent that the appellee and the learned Court below share the opinion that to hold that this statute permits a demand upon "either" officer would be productive of injustice and should be avoided. With this principle we have no quarrel; but with the application to the present statute we believe that the appellee and the District Court have erred. We desire to meet this point squarely,

because we believe that it is the true *ratio decidendi* of the District Court.

What did the Court below envision as the unjust result that might follow from holding that this statute did not require a demand upon both officers? Briefly, it is this: Suppose the present appellee, the treasurer, had been ready and willing to comply with the act but that he was prevented from doing so by the refusal of the president. The treasurer we may assume to have been served with a demand; the president is not. Since no demand has been made upon him, the president is not under the spur of action and the threat of mulcting by the penalties of the statute and consequently has no incentive to recede from his refusal. Now, says the District Court, in the language quoted above

“* * * even had the treasurer furnished or filed a report made and verified by himself only, it would not be a compliance with the statute which requires a report signed and verified by both the president and treasurer.”

Consequently, we are to infer that it follows that the treasurer, though anxious and willing to perform his duty is made liable because he cannot alone perform the exculpatory act. The Court below assumes that only by filing a report made and executed by both president and treasurer can liability be avoided.

If such a result would follow—or even might follow—from a holding that the statute did not require a demand on both, then a Court might well do a little violence to the language of a statute without departing

from the nature of the judicial process. Much may be ventured to avoid injustice.

But such results would not flow from the view that this statute does not require a demand on both officers. The appellant in his argument and the Court in its opinion have fallen into the error of assuming that only by the filing of a report made and executed by both would liability be avoided. But the statute does not so provide. Its provisions to the contrary are express and unmistakable. The fourth paragraph of the act in question does not penalize a *mere* failure to file the report, nor is a cause of action created merely because the report was not filed after demand. The language is specific, and to give rise to a cause of action it requires that the officer “*refuse or neglect*” this duty. The penalty itself repeats this phrase only a few words farther on and provides that fifty dollars shall be recoverable “for every day he or they shall so *neglect or refuse*”.

An officer ready and willing to perform could never be made liable; it is the officer who contumaciously refuses or neglects compliance with the law who feels its sanction.

The distinction drawn here is one that is supported by decided cases. In *Nassau Bank v. Brown*, 30 N. J. Eq. 478, the Court construed a very similar statute in which a penalty was imposed upon directors who should “neglect or refuse” to make certain reports. That Court held that in the absence of an allegation of neglect or refusal to act, a cause of action was not

made out, though the report had not been made and filed as required by law. In *Gennert v. Ives*, 102 Mich. 547, 61 N. W. 9, a statute containing the phrase "willfully neglect or refuse" and requiring the making and filing of a certain report by a corporation was construed by the Court to mean that a mere failure to make the report, not accompanied by a neglect or refusal to do so, did not provide ground of recovery.

These cases are persuasive authority for the conclusion that a willing treasurer, under the present statute, would not be subject to the penalties, although no report made and executed as required by the law had ever been filed. And it is submitted that this Court could well find that the statute in question was scientifically drafted precisely for the purpose of preventing the unjust result which otherwise might flow from permitting the demand to be served upon one officer only.

Construing the statute as allowing a demand on either officer aids in the achievement of the legislature's purpose.

It is a well known rule of construction that when more than one meaning can be placed upon a statute, that one should be chosen which will facilitate the legislative purpose, and constructions should be avoided that will tend to the frustration of that purpose. As we said at the beginning of this argument, the first paragraph of the statute states the compliance required by the legislature. The third paragraph is concerned with the effect of non-compliance. Under

that paragraph the mere absence of the stipulated report from the file of the auditor and from the file of the clerk results in the imposition of a penalty against the corporation. The fourth paragraph is not so much concerned with the fact of non-compliance as it is with the reason therefor.

The compliance with paragraph one requires the joint act of two officers, but non-compliance can be created by *one* officer. One officer, by neglecting or refusing to act, can prevent the other—no matter how willing—from making, verifying and filing the required report. We should not deny to the legislature the ability to see this fact. Nor should we think that a legislature that had foreseen this possibility did not undertake to redress the mischief where it existed. If either officer can prevent compliance, is it not reasonable that the statute should provide that demand be served upon such officer?

On the other hand, if we assume that one officer is willing to comply and the other neglects or refuses to do so, is it reasonable that, as the appellee contends, the statute requires demand made upon both? As we have seen above, the willing officer, under this statute, is liable for no penalty. What, then, is to be achieved by demanding of him that he do an act that he is ready and willing to do? This is certainly a vain act; and construction that would result in a vain and bootless act must surely be unreasonable. On the contrary, to require service of the demand upon the unwilling officer only is to strike at him who obstructs the compliance required by the legislature. To say

that service upon him alone is not sufficient to make him subject to the penalties is to blunt the goad the legislature sharpened for his encouragement. The effect is to make more difficult the enforcement of the legislative will.

If both officers refuse compliance with the statute, the view of the Court below and of the appellee that both must be served, would, by increasing the burden on the party plaintiff, tend to decrease the facility with which the legislative purpose could be achieved. Those who refuse compliance with the law would not be reluctant to adopt tactics by which its sanctions are to be evaded. By that view both would have to be present before either could be made liable. If either was absent, they might continue a course of willful disobedience in complete immunity. This statute should not be construed so as to permit such result.

To permit the demand to be made upon the officer neglecting or refusing without regard to his fellow officer is, we submit, the view that would facilitate the end to be achieved by this statute, would avoid a burden upon the party plaintiff that in many instances would be insupportable; would avoid the unreasonable need of serving a willing officer and would prevent successful conspiracies whereby both officers might refuse with impunity.

The statute creates a joint and several liability upon the officers.

In the case below one of the appellee's grounds of demurrer was that there was a non-joinder of a nec-

essary party defendant and in his brief, on page ten, he argues that the president of the corporation should have been joined.

In discussing statutes of the type with which we are here concerned the following appears in 2 Thompson on Corporations (3rd Ed.) 1011, Sec. 1451:

“Peculiar wording of some of these statutes leaves doubtful the question as to whether the action must be against one or a number. This may depend largely on the wording of the particular statute.”

It is submitted that the particular wording of paragraph four of the present statute by its very terms creates a joint and several liability against either or both the president and treasurer and that the District Court properly so held in its opinion (Transcript p. 11).

An aggrieved stockholder is one who brings himself within the terms of the statute.

The appellee's brief under point 2, page 11, argues that the present appellant is not an “aggrieved” stockholder within the meaning of that term as used in the statute in question.

The language of the statute clearly shows that it was the purpose of the legislature to permit any stockholder who had complied with the requirements of this section and under the circumstances therein stipulated to have a cause of action and recover the amount provided. The appellee now argues that since

the legislature calls such a stockholder "aggrieved" he must have suffered some legal loss or injury in addition to his being the stockholder designated by the law as being entitled to recover. Such logic is self-defeating. On page 12 of his brief he defines "aggrieved" as one who is injured in the legal sense—in short, we may say, one who has a cause of action. If the present appellant has complied with the statute he has a cause of action and consequently is "aggrieved".

In *Kelsey v. Pfaulder Process etc. Co.*, 3 N. Y. S. 723, the Court construed a statute of New York and held that as used in that statute the term "injured party" was a stockholder to whom an officer of a corporation "refused or neglected" to exhibit the stock book and that no showing of additional injury was necessary for the plaintiff therein to qualify as an injured party. *Buker v. Steele*, 43 N. Y. S. 346 (Co. Ct.), construed a later Act of New York requiring the stock book of any corporation to be exhibited to any stockholder and inflicting a penalty of fifty dollars per day against officers who "neglect or refuse" so to exhibit, to be recovered by "the party injured". That Court held that the denial of the right to inspect was the injury contemplated by the statute and was sufficient to subject the defendant to the penalty without any showing of any other injury by the stockholder or creditor plaintiff.

**The statute is not repugnant to the
Constitution of the United States.**

Under point 3 of his brief, page 13, the appellee contends that the statute under examination is repugnant to the due process clause of the Constitution of the United States. He argues in part: "We have not been able to find a similar statute anywhere assessing such a heavy and arbitrary penalty against officers of a corporation personally in favor of creditors and stockholders; and without any showing required by such creditors or stockholders that they were in some way damaged or injured in consequence of failure to file a report." (Appellee's Brief p. 3.)

In 2 Thompson on Corporations (3rd Ed.) *sub nomine* "Directors" there are cited literally hundreds if not thousands of cases arising from just such statutes. And in consequence we dare to say that similar statutes either now are, or have been, the law of every state of the Union.

The present statute has never had its constitutionality determined in any court, nor has research enabled us to produce a constitutional holding by the Supreme Court of the United States on any similar statute. The Supreme Court has had cases before it which arose under penal statutes of this type, but apparently the constitutional question has never been raised. For example, see *Huntington v. Attrill*, 46 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. 224. Cases based on statutes of this type have been before District Courts of the United States and before the

United States Circuit Court of Appeals, but in no case has a holding of unconstitutionality been made.

The appellee argues that the amount of the penalty renders this statute invalid (Appellee's Brief pp. 14, 19). The fifty dollar a day penalty is indeed small in comparison with many statutes enacted in the several states which render officers or directors liable for "all the debts of the corporation" for failure to file certain reports. And for example, the State of California formerly had a statute imposing a penalty of one thousand dollars for a single failure to file a report. *Anderson v. Byrnes*, 122 Cal. 272, 54 P. 821, reviews the litigation under this law and therein states that the statute gave rise to many cases. Yet so highly was this enactment regarded that the *Anderson* case was under the necessity of deciding that it had been constitutionally *repealed*.

The cases on constitutionality cited by the appellee are not in point. Not one concerns a statute giving a right of recovery to a stockholder for the purpose of enforcing the state's visitatorial power over a corporation.

In the absence of a holding that a statute such as the one here involved is unconstitutional, the acquiescence of the state and federal Courts in the enforcement of similar statutes in hundreds of cases for a period of eighty years is indicative of this statute's constitutional validity.

CONCLUSION.

We submit that the judgment of the District Court should be reversed and this case sent down for further proceedings.

Dated, San Francisco, California,
September 21, 1942.

Respectfully submitted,
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